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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1353

UNITED STATES OF AMERICA,
Respondents,

v.

IRA S. BUSHEY & SONS, INC., TANKER HYGRADE NO. 8 INC., SPENTONBUSH TRANSPORT SERVICE, INC.,
Petitioners,

NORTHERN OIL COMPANY, INC., and NORTHERN TERMINALS, INC.,
Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CHRISTOPHER E. HECKMAN
Counsel for Petitioner
80 Pine Street
New York, New York 10005

MARTIN J. McHUGH
LARRY M. CARLIN
On the brief

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Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Ira S. Bushey & Sons, Inc., and the other parties named as petitioners (subsidiaries of the first petitioner) pray that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Second Circuit, entered on December 7, 1973, affirming without opinion the judgment of the United States District Court for the District of Vermont in favor of respondent which enjoins these petitioners-defendants-appellants from operating their oil-carrying vessels in the Vermont waters of Lake Champlain unless they comply with eight regulations imposed by the Court.

The other named defendants, Northern Oil Company Inc. and Northern Terminals Inc., are no longer parties to this litigation, having consented to judgment before trial.

Citation to Opinions Below

The opinion of the United States District Court for the District of Vermont reproduced as Appendix A herein (*infra* pp. 1a-28a) is reported at 363 F. Supp. 110 (1973). The Court of Appeals did not write an opinion.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit is dated December 7, 1973 (Appendix C *infra* pp. 30a-31a). A timely petition to the Court of Appeals for rehearing (Appendix D *infra* pp. 32a-33a) and suggestion for rehearing *in banc* (Appendix E *infra* p. 34a) were denied by orders entered February 6, 1974.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

Statutory Provisions Involved

This petition involves the following statutory provisions which are reproduced in the appendix,

A. 33 U.S.C. § 407 (Appendix F *infra* p. 35a);

B. 33 U.S.C. § 1161 (j) (1) (Appendix G *infra* p. 36a);

C. 33 U.S.C. § 1321 (j) (1) (Appendix H *infra* p. 37a);

D. 46 U.S.C. § 391a (Appendix I *infra* pp. 38a-46a).

The Question Presented

When Congress, with full knowledge of the risks and hazards involved in the vessel transportation of oil, authorizes, licenses and regulates that activity, and the latter is carried on in strict compliance with applicable statutes and regulations governing design, construction, operation, manning, equipping, loading and unloading of vessels, may a federal court declare such activity a nuisance because it involves the same risks and hazards which Congress recognized when it delegated regulatory authority to the Coast Guard?

Statement

Petitioners transport petroleum products in substantial quantities to Burlington and Shelburne Harbors, Vermont by tank barges towed by tugboats frequently hired from independent contractors. Each of the involved vessels is enrolled as a vessel of the United States and duly licensed to carry on the coastwise trade. Each of the barges was inspected by the United States Coast Guard and issued a certificate attesting compliance with all applicable Coast Guard requirements.

Between April 30, 1967 and June 1, 1971, petitioners' vessels were involved in seven sporadic, unconnected and unintentional oil spills which are alleged to constitute unlawful discharges of refuse matter into the navigable waters of the United States in violation of 33 USC 407. Briefly stated, these spills were caused by latent defects in Coast Guard inspected equipment, defects of which petitioners did not have knowledge, the negligence of tugs (acting as independent contractors) towing petitioners' vessels, the negligence of parties over whom petitioners had no control, and in one instance, by a collision resulting from neligence of petitioners' tug captain.

The District Court held that the Refuse Act (33 USC 407) and the federal common law of nuisance constituted grounds for granting relief.

The Court enjoined these petitioners from operating oil-carrying vessels in the Vermont waters of Lake Champlain unless (1) prior to discharge of cargo a conference be held between the vessel and the shore terminal personnel (2) during discharge of cargo the barge supply adequate illumination, between sunset and sunrise, of the connection point between the vessel discharge hose and the shore terminal receiving line (3) before and during discharge, a licensed tankerman check the surrounding water for evidence of pollution, (4) voice communications be maintained between vessel and shore terminal, (5) no alcohol be consumed on board any vessel, (6) a contingency plan for oil spills be prepared for approval by EPA, (7) at least one man connected with transportation or discharge of oil be a certificated tankerman and (8) a checklist of items one through four be maintained and reported to the Environmental Protection Agency.

Prior to the District Court's decision the Coast Guard had issued regulations applicable to all oil vessels, including petitioners', on each of those subjects (33 CFR Parts 154, 155 and 156). The Court's regulations conflict with some of those.

In the preamble to its December 21, 1972 publication of the involved pollution prevention regulations (37 Fed. Reg. 246 Part II) the Coast Guard discussed various alternatives, commented on government, public and industry problems or objections involved in the discussed regulations, and gave reasons for their adoption in the face of those objections. It stated toward the end of Subsection 4(b) that the regulations represent "an attempt to achieve oil-free waters through a reasonable balance of punitive deterrants and modification of design, construction, and operation intended to minimize the opportunity for and

the effects of human error or negligence." It also stated that the regulations are intended to "provide maximum protection to the environment while remaining within economic and practical bounds."

Petitioners contend that the Congressional delegation of regulatory authority to the Coast Guard pre-empted the federal courts of jurisdiction to enjoin operation of their vessels when they comply with all applicable Coast Guard regulations.

Reasons for Granting the Writ

We submit the Court committed fundamental error when it construed this Court's decision in *Illinois* v. *City of Milwaukee*, 406 US 91 (1972) as authorizing a federal court injunction against an operation regulated by a federal agency rather than as authority against such federal court action. In that case this Court held that under the federal common law of nuisance a federal court could enjoin operation of a refuse disposal plant likely to cause harm to citizens of another state. But the basis of that decision was the absence of any regulatory authority over the operation of such a plant, thus making invocation of the federal common law of nuisance the only remedy available to protect the interests of the citizens. In that opinion this Court expressly recognized the proposition of pre-emption of federal common law by Congressional delegation of regulatory authority, stating (at 107):

> "It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance."

The field of federal law of nuisance, insofar as it involves oil-carrying vessels, has been completely preempted by statute, 46 USC 391(a) and others, and by Coast Guard regulations issued pursuant thereto.

Congress, expressly recognizing the same hazards from oil spills described in the District Court opinion in this case, legislated extensively and comprehensively concerning oil-carrying vessels with a view toward minimizing those hazards. It left no phase of the design, operation, manning, loading or unloading of oil-carrying vessels uncovered, thereby pre-empting federal courts of jurisdiction to impose on those vessels self-drawn regulations.

In addition to 46 USC 391 (a) (*infra* pp. 38a-46a), the following statutes deal with regulation of oil-carrying vessels: 33 USC 1161 (j) (1) (The Federal Water Pollution Control Act), (*infra* p. 36a), 33 USC 1321(j)(1) (The 1972 Amendments to the FWPCA), (*infra* p. 37), 33 USC 1203 (Vessel Bridge-to-Bridge Communication Act), 33 USC 1221 (Ports and Waterways Safety Act), and 46 USC 405 (Towing Vessel Operator's Licensing Act.).

In the Ports and Waterways Safety Act, *supra*, Congress stated that the authority thereby given to the Coast Guard to establish vessel traffic systems was granted "* * * to protect the navigable waters and the resources therein from environmental harm resulting from vessel or structure damage."

Presently, under statutory authority, the Coast Guard investigates all marine casualties (46 CFR Part 136). It has the right to board and inspect any vessels upon the navigable waters (33 USC 1321 (m)). It may penalize licensed or certificated individuals for misconduct or inattention to duty (46 CFR Part 137). It has authority to impose a civil penalty for an oil spill, intentional or otherwise (33 USC 1321 (b)).

Thus it is clear, we submit, that Congress intended to leave to the Coast Guard and to it alone, complete jurisdiction to regulate all phases of operation of oil-carrying vessels throughout the entire United States, to minimize water pollution and the effects thereof.

That Congress intended uniformity in the promulgation and application of rules and regulations intended to secure effective provision for vessel safety and for protection of the marine environment is manifest from subsection 3 of 46 USC 391 (a) (*infra* pp. 38a-46a). That subsection provides that the Secretary of the department in which the Coast Guard is operating shall establish for all vessels to which the section applies

> "* * * such additional rules and regulations as may be necessary with respect to the design and construction, alteration, repair, and maintenance of such vessels, including, but not limited to, the superstructures, hulls, places for stowing and carrying such cargo, fittings, equipment, appliances, propulsive machinery, auxiliary machinery, and boilers thereof; and with respect to all materials used in such construction, alteration, or repair; and with respect to the handling and stowage of such cargo, the manner of such handling or stowage, and the machinery and appliances used in such handling and stowage; and with respect to equipment and appliances for life saving, fire protection, and the prevention and mitigation of damage to the marine environment; and with respect to the operation of such vessels; and with respect to the requirements of the manning of such vessels and the duties and qualifications of the officers and crew thereof; and with respect to the inspection of all the foregoing."

By subsection 4 of the same section, Congress directed that before any rules or regulations are approved by the Secretary (except in an emergency) he shall consult with other appropriate federal departments and agencies, publish the proposed rules and permit interested persons an opportunity for hearing. The Secretary is directed in prescribing the rules to consider, among other things, the practicability of compliance therewith, "including cost

and technical feasibility." Certainly the Congressional intent will be completely frustrated if each federal court, without consulting other appropriate federal departments and agencies, and without considering the practicability of compliance, including cost and technical feasibility, may impose self-made regulations by invoking the federal common law of nuisance in respect of an operation which Congress specifically recognizes as involving some hazards.

Kelly v. *The State of Washington,* 302 US 1 (1937), involved the question whether a state had authority to promulgate regulations for the inspection of motor-driven vessels smaller than those subject to Coast Guard regulation by United States statutes. This Court concluded that Congressional omission to provide for inspection of such vessels left states free to enact requirements for them. However, in the course of its opinion, the Court said (at 14):

> "For example, Congress may establish standards and designs for the structure and equipment of vessels and may prescribe rules for their operation which could not properly be left to the diverse action of the States. The State of Washington might prescribe standards, designs, equipment, and rules of one sort, Oregon another, and California another, and so on."

After noting the adverse effect that would result from conflicting state laws, the Court held that the Washington law did not conflict with then existing federal laws, but stated (15):

> "If, however, the state goes further and attempts to impose particular standards as to structure, design, equipment and operation which, in the judgment of its authorities, may be desirable but pass beyond what is plainly essential to safety and seaworthiness, the State will encounter the principle that such requirements, if imposed at all, must be through the actions of Congress, which can establish a uniform rule."

This Court's reference to the devastating effect of different states prescribing different standards, designs, equipment and rules stated in *Kelly* (*supra*), applies equally to federal district courts. Cf. *Hughes Tool Co.* v. *Trans World Airlines*, 409 US 363 (1973).

Our research does not disclose any other decision on the subject of federal court jurisdiction to impose self-drawn regulations on oil-carrying vessels since passage of 46 USC 391a. But the importance of this question to operators of oil-carrying vessels throughout the United States and indeed to all regulated carriers, airlines, buses and railroads as well, is at once apparent.

If a federal court, by resort to the federal common law of nuisance, may impose its own regulations on Coast Guard regulated oil vessels, it may do so on railroads moving oil tank cars, airlines using oil for fuel, and on interstate bus lines. The elaborate schemes for uniform regulation of those classes of operations, so carefully worked out by Congress and so long deemed necessary by this Court (cf. *Kelly* v. *State of Washington, supra*), will be worthless if, after one or more oil spills, any federal court may impose its self drawn regulations on the involved operator.

The important question of federal court jurisdiction to impose its own regulations on an operation regulated by a federal agency deserves to be settled now, once and for all, by an authoritative decision of this Court.

We submit that if the decision of the District Court be the law, oil vessel owners will hesitate to build new vessels in fear that the Coast Guard approval of design, equipment, operation, loading and manning may not meet the approval of a District Court. The latter could accept the opinion evidence of an expert witness whose views the Coast Guard previously heard but, in its Congressionally recognized expertise, rejected.

As the record in this case shows, many oil-loading terminals are located on the New Jersey shore of New York

Harbor. A vessel loading there for discharge in Vermont must transit the territorial jurisdiction of five District Courts: New Jersey; Southern, Eastern and Northern Districts of New York; and Vermont. If each of those District Courts may make its own rules and regulations concerning an individual vessel, countless operational, structural, equipment, and manning problems will result to all vessel operators.[1]

Perhaps a more important consideration for granting the writ is the exposure of the already overburdened federal courts to countless suits by private parties and environmental associations. By such suits each party will seek to invoke the federal common law remedy of public nuisance to enforce its own ideas of appropriate standards of environmentalism by circumventing congressional conclusions on that subject. As previously demonstrated Congress has concluded that the economy of this country requires water transportation of oil despite its hazards. Congress decided that the best interests of the country would be served by having the Coast Guard devise appropriate safety regulations after consultation with other involved agencies and after public hearings. If every discontented individual or environmental association may apply to its local federal court for an injunction against operation of oil vessels in its jurisdiction unless in compliance with special local regulations beyond those of the Coast Guard, the courts will be flooded with suits and the industry will be stymied.

That the Court's regulations in this case may be claimed to be only mildly inconsistent with the Coast Guard regulations does not detract from the general importance of the legal question involved. If a federal court has the jurisdiction to *consider* imposing its own regulations on an

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[1] American Waterways Operators Inc., a non-profit trade association representing the national interests of operators of vessels including oil transporting craft, intervened in the Circuit Court and filed a brief seeking reversal of the District Court's decision. It has over 250 members.

operation already completely regulated by a federal agency, it has the power to impose them, whether or not in conflict. If a federal court be held to have such jurisdiction provided the regulations are consistent with those of the appropriate federal agency, that jurisdiction is redundant and futile. Moreover, question immediately arises as to whether the court or the agency determines the conflict question and which may have the last word.

That question is involved in this case. In its regulations concerning the illumination of the vessel discharge hose connection with the shore terminal connection the Coast Guard, for reasons it seemingly deemed obvious, required a self-propelled tanker to furnish such illumination 33 CFR 155.790 but imposed upon the shore terminal the obligation to illuminate a similar connection between the terminal and a non-self-propelled barge 33 CFR 154.570 (a) (3), (4). The Court disregarded the Coast Guard's distinction and required the barge to furnish the illumination, stating that it could "see no earthly distinction in the necessity of deck lighting between a self-propelled and a non-self-propelled vessel, other than a limited item of expense, perhaps" (*infra* p. 24a). Thereby considerations which led the Congressionally recognized experts, the Coast Guard, to make the distinction were completely disregarded and the Congressional intention that feasibility be considered (cf. 46 USCA 391a (4) (*infra* pp. 38a-46a)) was defeated.[1]

The decision cannot be justified on the ground that some of petitioners' acts constituted violations of the Refuse Act, 33 USC 407 (*infra* 35a).

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[1] One obvious distinction is that barges are designed to pass under low clearance fixed bridges and other structures which prevent the installation of lighting fixtures high enough to illuminate the hose connection point. Self-propelled vessels carry such fixtures but cannot pass under low fixed bridges, and cannot reach Lake Champlain since they must transit the Champlain canal, where an overhead clearance of only 15 feet is available. (Cf.) *United States Coast Pilot II*, 6th Edition, p. 182.

The legistive history of PL 92-340 which contains the 1972 amendments to 46 USCA 391 (a) shows Congress recognized that the problem of marine pollution resulting from water transportation of oil is "a continuing one which will not be solved immediately." 1972 *Cong. & Adm. News,* 2909.

Thus it cannot be denied that Congress was fully aware of the likelihood of the recurrence of Refuse Act violations resulting from various types of casualties including each type described in the Court's findings. Nevertheless, Congress concluded that the solution was strict regulation by the Coast Guard, not prohibition of the activity. We submit that if a federal court has authority to declare such activity a nuisance, because a violation of the Refuse Act, 33 US 407 (*infra* pp. 38a-46a) may result, it has authority to ban the activity, thereby overriding the Congress of the United States.

For the reasons discussed above, there cannot be, we submit, any jurisdiction in a District Court of the United States to issue its own regulations for operation of licensed and Coast Guard approved oil-carrying vessels.

CONCLUSION

It is respectfully submitted that the foregoing considerations warrant allowance of the writ sought by petitioners.

Respectfully submitted,

CHRISTOPHER E. HECKMAN
Counsel for Petitioners
Office and Post Office Address
80 Pine Street
New York, New York 10005

MARTIN J. McHUGH
LARRY M. CARLIN
On the Brief

APPENDIX A

Opinion of the District Court.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Civil Action File No. 6380

UNITED STATES OF AMERICA,

v.

IRA S. BUSHEY & SONS, INC., TANKER HYGRADE NO. 8 INC., SPENTONBUSH TRANSPORT SERVICE, INC., NORTHERN OIL COMPANY, INC., and NORTHERN TERMINALS, INC.

George W. F. Cook, United States Attorney, Rutland, Vermont, for plaintiff.

Ryan, Smith & Carbine, Rutland, Vermont, and Christopher E. Heckman, McHugh, Heckman, Smith & Leonard, New York, New York, for defendants Ira S. Bushey & Sons, Inc., Spentonbush Transport Service, Inc., and Tanker Hygrade No. 8 Inc.; Donald E. O'Brien, Burlington, Vermont, for defendants Northern Oil Co., Inc., and Northern Terminals, Inc.

FINDINGS, OPINION AND ORDER

1. Defendant Ira S. Bushey & Sons, Inc. (hereinafter "Bushey"), is a New York corporation having offices at 764 Court Street, Brooklyn, New York.

2. Spentonbush Transport Service, Inc. (hereinafter "Spentonbush"), is a wholly-owned subsidiary of Bushey and a New York corporation having offices at 500 Fifth Avenue, New York, New York.

3. The directors of Bushey and the directors of Spentonbush are the same persons, Francis B. Bushey, Ira S. Bushey and Raymond J. Bushey. The officers of Bushey and Spentonbush are substantially the same.

4. Defendant Bushey wholly owns approximately 40 corporations, each of which owns vessels used in the transportation of liquid cargoes; of these approximately 25 tugs and barges are capable of operating in the Vermont waters of Lake Champlain, a navigable water of the United States, and most of these vessels do in fact operate in Vermont waters. Among such vessels are Tanker Hygrade No. 8, owned by defendant Tanker Hygrade No. 8 Inc., and the tug Carmelite owned by defendant Tug Carmelite Corporation.

5. Spentonbush is and has been for a number of years engaged in the business of the solicitation of orders for transportation of liquid cargoes by water, and of arranging for performance of such transportation by vessels, and it gives preference to vessels of Bushey subsidiaries in arranging water transportation contracts.

6. Spentonbush collects transportation charges for such water transportation, deducts a commission and remits the balance to the owners of the particular tank barge and tug boat involved.

7. Since December, 1970, crews used by vessels owned by Bushey subsidiaries have been hired and employed

either by Spentonbush or by Hygrade Operators, Inc., a wholly-owned subsidiary of Bushey.

8. None of the wholly-owned, vessel-owning, corporate subsidiaries of Bushey operating in Lake Champlain employs its own crews, its own accounting personnel, or any other employees except for its officers. The officers and directors of each subsidiary corporation, except Spentonbush, are identical to the officers and directors of defendant Bushey.

9. The net profit or surplus from the operations of Spentonbush and other wholly-owned Bushey subsidiaries are remitted to Bushey by way of corporate dividends.

10. Navigation on Lake Champlain is governed by the Navigation Rules for Inland Waters, 33 U.S.C. §§ 151-295, and by such other Navigation Rules as the United States Coast Guard has promulgated pursuant to the authority given it by 33 U.S.C. § 157.

11. Each of the vessels operated by the defendants on the waters of Lake Champlain, particularly in the Burlington and Shelburne area, is an enrolled vessel of the United States and is duly licensed to carry on the coastwise trade; each of the barges operated by the defendants on the waters of Lake Champlain, particularly the Burlington and Shelburne area, has been inspected by the United States Coast Guard and issued a Certificate of Inspection. The Federal Maritime Commission has issued to the operators of each of the barges of the defendants using the waters of Lake Champlain, particularly the Burlington and Shelburne area, a Certificate of Financial Responsibility (Oil Pollution), attesting that the operator has evidenced financial responsibility to meet the liability to the United States

of America which may result from the discharge of oil into or upon the navigable waters of the United States, adjoining shore lines, or into or upon the waters of a contiguous zone. Much damage may occur, however, from oil spills in Lake Champlain that is not reimbursable in money.

12. During the period from May 1 to December 1 each year, or thereabouts, petroleum products are transported by tank barges and tugboats from the Hudson River locks to the Burlington and Shelburne harbors. In 1970, 1971 and 1972 over 500,000 tons of diesel fuel, fuel oil, gasoline, jet fuel and kerosene was thus transported.

13. In 1970 Bushey subsidiaries transported into lake Champlain and delivered about 45 million gallons of petroleum products to unloading points on Vermont shores, ten of which are in Burlington Harbor.

14. In 1971 alone, approximately ten barges of wholly-owned Bushey subsidiaries and one barge of a partly owned corporation, the barge Erie, plus a number of tugs owned by other Bushey subsidiaries, transported 175 barge-loads of petroleum products into Lake Champlain, 53 of which delivered approximately 125,000 tons, or about 36 million gallons of petroleum to Vermont shores.

15. In 1972, Bushey subsidiaries transported into Lake Champlain and delivered about 43 million gallons of petroleum products to Vermont shores.

16. In each of the years 1970, 1971 and 1972, Bushey subsidiaries transported into Lake Champlain and delivered to Vermont shores approximately 25 per cent of the total amount of petroleum delivered to Vermont shores during each of said years. All of this was shipped from

points or places outside Vermont and thus this was entirely interstate transportation.

17. From April, 1967, through December, 1970, the Army Corps of Engineers investigated a total of ten oil spills in the Burlington-Shelburne harbors. Vessels of Bushey subsidiaries were involved in five of these oil spills.

18. During 1971 and 1972, vessels of Bushey subsidiaries have been involved in four additional oil spills affecting Vermont waters of Lake Champlain, or a total of nine such spills during the period April 1967-December 1972.

19. The effect of an oil spill on water varies with the kind of spill—jet fuel evaporates quickly while heavy heating oil does not—and environmental conditions; with certain kinds of oil under certain conditions, as those of turbulence, shear forces at the oil-water interface may prevail causing an influx of oil into the water column rather than mere confinement of it to the surface where it may be more easily contained.

20. The basic steps for reducing the environmental effects of an oil spill include surrounding the spill with an oil containment boom, that is, a floating barrier with skirt and sail, and then removing the oil by oil-skimming machines and "sorbents" (either ab- or ad-) or both. The art of oil spill clean-up is not very advanced and is less effective in certain areas, as for example those of marsh-grass which sustain life for many creatures and organisms, than in others.

21. On April 30, 1967, tank barge Hygrade No. 30, owned by Tanker Hygrade No. 30, Inc., a wholly-owned subsidiary of Bushey, pumped approximately 14,500 gallons of jet fuel into the waters of Lake Champlain while dis-

charging its cargo at the Northern Oil Terminal or dolphin in Burlington harbor.

(A) The Tanker Hygrade No. 30, Inc., started pumping around midnight.

(B) The pumping took six or seven hours but the strong odor of gasoline remained on the lake front for about 12 hours. A sticky petroleum product was present on the shore line and had entered several small bays. The petroleum product from the spill remained visible on the shore for several days.

(C) The spill was due to a leak in Northern Oil's pipe coming from the dolphin to the shore.

(D) But it may be inferred that the Tanker Hygrade No. 30 continued to pump jet fuel into Vermont waters of Lake Champlain for some time after the tankerman had reason to know of the leak, since the smell of vapor was strong enough to awaken a nearby resident.

22. On August 27, 1967, tank barge Hygrade No. 28, owned by Tanker Hygrade No. 28, Inc., a wholly-owned subsidiary of Bushey, ran aground at Proctor Shoal while approaching Shelburne Harbor, Vermont, causing a spill of an estimated 1,600 gallons of gasoline into Vermont waters of Lake Champlain.

(A) The tank barge Hygrade No. 28 was being pushed by tug Colleen Kehoe at the time of the grounding. The Colleen Kehoe was under the hire of Spentonbush which had selected the tug, and Spentonbush received a commission for this service, which commission was a financial benefit to Bushey. The negligence of the Colleen Kehoe caused the spill.

(B) A gas spill of this type presents a risk of damage by fire to lake front property.

(C) The grounding resulted in a rupture of the starboard bow of the Tanker Hygrade No. 28, Inc., from which came a steady flow of gasoline. It was necessary for the Coast Guard to lay out foam over a large area covered by the spill. The Coast Guard, as a safety measure, sealed off the area of the spill from Lake traffic.

23. On June 26, 1969, tank barge Hygrade No. 30, owned by Tanker Hygrade No. 30, Inc., delivered a cargo of jet fuel at Northern Oil Terminal dolphin in Burlington harbor; caps or flanges were not placed on the ends of the pipe lines at the dolphin by the crew of the Tanker Hygrade No. 30, causing an oil or jet fuel spill into Vermont waters of Lake Champlain. The Northern Oil personnel were also negligent in not discovering that the caps or flanges were missing.

24. On October 5, 1969, tank barge Hygrade No. 26, owned by Tanker Hygrade No. 26, Inc., a wholly-owned subsidiary of Bushey, while under tow by the tug Champlain, owned by New York Scow Corporation, a wholly-owned subsidiary of Bushey, ran aground at Proctor Shoal as it was approaching Shelburne Harbor, Vermont, causing at least 10,000 gallons of gasoline to spill into Vermont waters of Lake Champlain.

(A) The gasoline spill caused a fire hazard, requiring the Coast Guard to close Shelburne Harbor for about 24 hours.

(B) The spill covered an area on Lake Champlain at least 400 feet by one-half mile, and the spill was at least one-half inch thick, and possibly as thick as 1½ inches.

(C) The grounding occurred near the buoy at Proctor Shoal. Chief Schwencke of the United States Coast Guard personally checked the location of the buoy after the

grounding and found the buoy to be "somewhat" but not very far off station, that is, that the buoy was 25 to 30 feet off station.

(D) While, accordingly, the spill may not be said to have occurred as a result solely of the negligence of the defendants, the episode demonstrates nevertheless the dangerousness of defendants' activities and the necessity for high standards of care on their part.

25. On August 15, 1970, tank barge Blue Line No. 108, owned by Tanker Hygrade No. 4, Inc., a wholly-owned subsidiary of Bushey, during unloading operations at the Gulf Oil Terminal in Burlington harbor, sustained a broken hose at the flange on the barge, resulting in the spillage of about 1,000 gallons of No. 2 fuel oil into the Vermont waters of Lake Champlain.

(A) The cause of the spill was the rupturing of the hose at the thimble. The hose belonged to the Blue Line No. 108, not the Gulf Terminal.

(B) The oil spill was extensive enough to require the United States Coast Guard to place 250 feet of boom in the immediate area of the spill in an attempt to contain the oil slick. Later, oil was discovered in a cove north of the spill area, and an additional 750 feet of boom was floated in an effort to contain the oil.

(C) Clean Water, Inc., of Toms River, New Jersey, performed a clean-up operation on August 16 and 17. Bushey paid for this clean-up.

(D) The oil spread to North Beach, a public bathing beach, with camping facilities, operated by the Park Department of the City of Burlington, Vermont. Daniel Dion, a Park Department employee, arrived at North Beach just before noon on August 15, 1970, to assist in cleaning

the beach of oil. Dion observed that oil covered the 100-foot wide beach to a depth of about three feet from the water, and extended along the entire one-quarter mile length of North Beach.

(E) While Dion was waiting for clean-up equipment to arrive, he noticed several gulls that came in and landed in the water. The gulls could not fly, after alighting on the oily water. The gulls then struggled to the shore and then toward the underbrush on the shore. The gulls still could not fly because of their oil-soaked condition. Dion attempted to care for two of the gulls, but they died. The others struggled into the underbrush.

26. On May 21, 1971, tank barge Hygrade No. 26, owned by Tanker Hygrade No. 26, Inc., was delivering oil to the Shell Oil Terminal in Burlington harbor. While doing so, due to a crack in the hull of the barge, about 20 gallons of oil leaked into the Vermont waters of Lake Champlain. Witness Sitler of the United States Coast Guard observed the oil bubbling from the barge, and it disappeared in about an hour.

27. On June 1, 1971, the Hygrade No. 8, a tank barge owned by Tanker Hygrade No. 8, Inc., a wholly-owned subsidiary of Bushey, while moored in Burlington harbor at the dolphin owned by Northern Oil Company, Inc., was rammed by the tugboat Carmelite II, owned by the Tug Carmelite Corporation, a wholly-owned subsidiary of Bushey, which resulted in damage to the hull of the Hygrade No. 8, causing a spillage of about 5,000 gallons of gasoline into the Vermont waters of Lake Champlain.

(A) At the time of the accident, the officer in charge of the Carmelite II was Thomas Bradley. Bradley did not hold a pilot's license issued by the United States Coast

Guard. Bushey does not require such licenses, nor are such licenses required by the Coast Guard.

(B) Bradley consumed at least five or six beers between 12:00 noon and 6:00 p.m. just prior to the accident at 9:15 p.m. on June 1, 1971, and was under the influence of alcohol at the time of the accident. The accident was, however, negligently, not intentionally, caused.

(C) Neither Bushey nor Spentonbush had ever issued any orders to its tug or barge employees prohibiting consumption of alcoholic beverages prior to reporting to work.

(D) The gasoline spill from the Hygrade No. 8 came from a six-inch crack above the waterline of the barge.

(E) The slick caused by the spill was extensive enough to require the Burlington Fire Department to stand by on the beach. The Burlington Light Station and the Burlington Fire Department monitored the spill throughout the night of June 1 and 2, 1971.

28. On September 30, 1972, while under way between Locks 9 and 11 of Lake Champlain Canal, barge Hygrade No. 18, owned by the Tanker Hygrade No. 18, Inc., a wholly-owned Bushey subsidiary, was struck by the tank barge Blue Line No. 107 being pushed by the tug Seneca, both owned by corporations which are wholly-owned by Bushey subsidiaries. The resulting collision caused the Hygrade No. 18 to strike rocks on the bottom of the canal which caused No. 6 fuel oil to leak from Hygrade No. 18 into the canal. The canal flows north into Vermont waters of Lake Champlain, but there is no evidence that the oil spilled in the canal did so flow. But Hygrade No. 18 proceeded into Lake Champlain and toward Ticonderoga after the ramming and oil was seen to bubble out of it into the lake.

(A) Before the collision, the captain of the tug Kehoe, which was pushing tank barge Hygrade No. 18, was in

radio communication with the captain of the tug Seneca, which was pushing the tank barge Blue Line No. 107. The captain of the tug Seneca agreed to hold back at Bray Terminal, which was an area wide enough for the vessels to pass. After agreeing to do this, the captain of the tug Seneca disregarded the agreement, and proceeded about three-quarters of a mile southerly. As the tug and barge approached each other, the captain of the Kehoe brought his tug and barge to a halt and he attempted by radio to warn the Seneca and Blue Line No. 107 not to pass. The captain of the Seneca did not answer the radio warning, and the barge Blue Line No. 107 hit the Hygrade No. 18 while attempting to pass, resulting in the damage to the Hygrade No. 18 and a subsequent oil spill.

(B) The Hygrade No. 18 spilled between 200 and 1,145 gallons of No. 6 oil along some six miles of the canal and also in the Vermont waters of Lake Champlain.

(C) The spill from Hygrade No. 18 was such as to cause defendant Bushey to expend the sum of $150,000 in cleaning the Champlain Canal of No. 6 oil.

29. On November 6, 1972, while unloading kerosene at Metropolitan Oil Company, in Plattsburgh, New York, from tank barge Hygrade No. 8, owned by a corporation which is a wholly-owned Bushey subsidiary, a tankerman (who did hold a Tankerman's Certificate) aboard the Hygrade No. 8 failed to close a valve resulting in kerosene being pumped into Lake Champlain, from whence it may have flowed into Vermont waters of Lake Champlain.

(A) Following the spill, defendant's agent Laba went to the scene, and fired the entire crew of the Hygrade No. 8 for intoxication.

(B) The spill of kerosene was clearly visible on the waters of Lake Champlain. The wind and currents car-

ried the spill across Lake Champlain toward Vermont waters.

30. Lake Champlain is a part of the Atlantic flyway, so-called, which is one of the five or six major arteries or flyways used by migratory birds in their flights from Canada to the United States, and points southerly, and return.

31. The migratory bird population in the Lake Champlain area commences to build up as early as August and reaches a peak in late October or November, with migratory birds being present as late as mid-December. The peak populations include waterfowl numbering around 30,000 "dabblers" and 35,000 "divers" in mid-November.

32. Migrations of waterfowl also occur in the spring months, but to a lesser amount. Lake Champlain also sustains a permanent summer population of certain types of birds.

33. Oil spills in Lake Champlain, partly because the calming effect of oil on water attracts birds, can cause serious damage and often death to waterfowl. This has happened in the past. Fortunately, despite the fact that ducks (and geese) tend to congregate in clusters, there has as yet been no major bird disaster as in Santa Barbara or San Francisco, California, or Martha's Vineyard, Massachusetts, where, the court takes judicial notice, there have been large oil spills resulting in the death of hundreds and even thousands of birds.

34. On December 13, 1964, a slick of No. 2 oil in Burlington harbor killed 14 birds in the area of North Beach owned by the City of Burlington. Similarly, at least six

birds were injured by the oil spill occurring in Burlington harbor on August 15, 1970, two of which were definitely killed by the oil.

35. Oil spills are a well known hazard to waterfowl. Oil attaches to the feathers of a waterfowl causing a "leak" in the plumage. This leak affects the waterfowl in several ways. If the waterfowl is on water when it comes in contact with the oil, it can cause the bird to lose its buoyancy, and sink, and drown. In cold weather the oil on the plumage can cause freezing and death from exposure. If the waterfowl gets to land, the oil can prevent the bird from flying, which in turn affects its ability to obtain food. Additives to the petroleum product can also poison the bird.

36. The chances of rehabilitating a waterfowl which has been exposed to an oil slick are usually very small. This is due to the fact that there are few people skilled in such rehabilitation and also because the damage is often irreparable.

37. Oil spills in Lake Champlain are particularly hazardous to the canvasback duck, a diving duck which goes one to 20 feet deep in the water and which is now on the Government's protected list of waterfowl, due to its decreasing population. Between 2 and 3 per cent of the world's population of canvasbacks pass through Lake Champlain.

38. Lake Champlain is also an area widely used by sport fishermen. Of the 55 species of fish that are found in Lake Champlain, some eight species are listed as game or sporting fish, which attract anglers.

39. Oil spills on Lake Champlain can have an adverse effect on fish life. Oil can damage or destroy spawning

areas, thereby decreasing the fish population. Oil also has an indirect effect on fishing, since fish exposed to oil have an oily taste. Further, fishermen tend to stay away from lake areas which have been exposed to oil.

40. Lake Champlain provides a recreation area for boating enthusiasts, bathers and campers.

41. The City of Burlington Parks Department maintains a large municipal beach and camping facilities at the north end of Burlington harbor, known as North Beach. The beach has about 2,000 feet of shore line, and the sandy area of the beach extends from 50 to 100 feet back from the shore line. The city also plans to extend its beach area in Burlington harbor.

42. For the past several years, North Beach has about 100,000 users during the course of the summer season. Users on peak days number as high as 8,000 people.

43. North Beach in the City of Burlington has been adversely affected by three oil spills during the last three years. The major spill affecting North Beach occurred on August 15, 1970, as a result of a hose rupturing while the Blue Line No. 108 was discharging a cargo of No. 2 oil.

44. Any oil spill at North Beach, following the oil spill and clean-up operations, also produces a loss of attendance by users of the beach and camping facilities, because users do not return immediately after the beach is re-opened. All of this produces a non-recoupable financial loss to the Burlington Park Department.

45. The City of Burlington, Vermont, uses Lake Champlain as its exclusive source for water. It is the water

supply for about 70,000 domestic, commercial and industrial users in the Burlington area.

46. The water is brought to the City of Burlington treatment plant by means of two large pipes extending 6,600 feet in length. The pipes lie below the surface of the water approximately 30 to 40 feet.

47. An extensive oil spill can adversely affect the water system of the City of Burlington. In December, 1964, an oil spill in Burlington harbor, in the area of the Northern Oil Terminal, damaged the water system to the extent that numerous complaints by water users were made to the effect that the water "tasted like kerosene." The Burlington City Health Officer was concerned about the possible toxic effect of oil additives. One of the two inlet pipes was turned off for a period of time to prevent further contamination of the Burlington reservoirs by the oil.

48. During the past five years, the nine oil spills in Vermont waters of Lake Champlain, involving Bushey controlled vessels, have either damaged, or presented a substantial risk of damage, to Vermont beaches, a major municipal water supply, and to waterfowl and fish, particularly in the Burlington-Shelburne harbor areas.

49. The booming of tank barges in Burlington-Shelburne harbors, prior to the discharges of petroleum products, is a desirable and feasible procedure to lessen the risk of, and damage from oil spills.

50. Eight hundred feet of boom, costing between $5 and $20 per foot, is sufficient boom for a normal booming of a tank barge of the size used by defendants in transporting petroleum products into Burlington-Shelburne harbor facilities. Booming requires the use of a power boat, however,

and it is much more feasible, as well as less expensive, to require terminal operators to retain booming equipment and a boat than to require each barge to carry such equipment.

51. A conference between shore based facility personnel and the crew of a tanker, prior to and during discharge of petroleum products, is a desirable aid to the prevention of oil spills. This conference, as the new Coast Guard Regulations taking effect generally on July 1, 1974, provide, should cover the following specific items:

(1) The identity of the product to be transferred.

(2) The sequence of transfer operations.

(3) The transfer rate.

(4) The name or title and location of each person participating in the transfer operation.

(5) Particulars of the transferring and receiving systems.

(6) Critical stages of the transfer operation.

(7) Watch or shift arrangement.

(8) Transfer shutdown procedures.

In addition the following should be known by personnel through written orders and regulations or covered in the conference:

(9) Federal, state and local rules that apply to the transfer of oil.

(10) Emergency procedures.

(11) Discharge containment procedures.

(12) Discharge reporting procedures.

52. To prevent or lessen the danger of oil spills, it is desirable that the connection point between the barge cable and the off-shore facilities, during the discharging of petroleum products, be illuminated with an average minimum lighting intensity of five foot candle power.

53. In order to prevent or lessen spills, during the discharge of petroleum products, a certified crewman aboard a tanker should be on watch at all times to check on the pumping operation, and to watch for the possibility of spills, and to detect actual spills.

54. A tank vessel should not be off-loaded of any petroleum product unless there is in operation a direct positive communications system between the shore facility personnel and the tankerman on duty and in charge of unloading. A two-way "walkie-talkie" radio is a desirable type of communication.

55. The use of alcoholic beverages by crewmen aboard tugs and barges involved in the transportation of petroleum products can be extremely hazardous.

56. A way to combat insobriety of crewmen aboard tugs and barges is to (1) make the officer in charge of the vessel responsible for his crew; (2) make certain that the officer in charge is backed up by his operators through the use of enforced personnel regulations; (3) make on duty inspections with regard to sobriety. It is impracticable, however, to try to regulate the off-duty drinking habits of tug-, barge- and tankermen.

57. The wake of a vessel operating in Burlington-Shelburne harbor can be of sufficient magnitude to cause the discharge hose of a tank barge discharging petroleum products to snap, thereby causing a spill. This hazard

can be substantially lessened by prohibiting vessels in Burlington-Shelburne harbors from traveling at such a rate of speed as causes a damaging wake. It is impractical for a court to enforce such an order, however, and the making and enforcement thereof lie within the United States Coast Guard's prerogatives.

58. The use of a "contingency plan" can be an important tool in preventing oil spills from barges, and in lessening the damage from such oil spills already in progress.

59. A "contingency plan" should contain the following four elements as minimum requirements: (A) Definitions of the parties in authority to be notified if a spill occurs; (B) a listing of the names, addresses and telephone numbers of people who should respond to an oil spill; (C) an inventory of resources and materials that are available either locally or regionally to deal with an oil spill, including a commitment to bring in outside resources where the oil pollution problem exceeds local resources; (D) the designation of one person to coordinate clean-up efforts, and who can direct the utilization of equipment and coordinate with proper federal and state authorities.

60. The duties required by a crewman aboard a tank barge, in discharging petroleum products, involve substantial skills and responsibilities. Only tankermen licensed by the United States Coast Guard are sufficiently qualified to provide such skills and handle such responsibilities.

61. Due to the numerous oil spills involving defendants Bushey and Spentonbush, and due to the violations of the Refuse Act by Bushey and Spentonbush, as appears from the records in the United States District Court for the

District of Vermont, the court finds that the Government is entitled to equitable relief against defendants Bushey and Spentonbush.

62. The court finds that the numerous oil spills that have occurred together with the continuation of slack operations by defendants as above described poses a continuing nuisance threatening the general public, wildlife, lakefront property owners and the environment of Lake Champlain and its shore lines.

63. The court finds that the numerous past oil spills that have occurred, the continuation of slack operations by defendants and the damaging effects of oil spills cause a continuing threat of irreparable harm to the navigable waters of the United States and hence to the plaintiff.

Opinion

As previously held, this court has jurisdiction of the parties and venue in the District of Vermont is proper. Public policy dictates that the veil of Bushey's and Spentonbush's separate corporate entities be pierced, since these corporations wholly own, control, manage, operate and in all ways supervise the operations of the many subsidiaries of Bushey. *See United States* v. *Ira S. Bushey & Sons, Inc.*, No. 6380 (D. Vt., Oct. 11, 1972) (unpublished opinion on motions to sever and transfer). The subsidiaries are mere corporate shells established for purposes of avoiding tort liability to the parent for the acts of the subsidiaries which are the alter egos of Bushey and Spentonbush. *Cf. United States* v. *Parfait Powder Puff Co.*, 163 F.2d 1008, 1010 (7th Cir. 1947), *cert. denied*, 332 U.S. 851 (1948). Injunctive relief against only one or a few of the subsidiaries could easily be circumvented by the parent, with the assistance of the similarly wholly owned Spentonbush, simply by using other subsidiary corporations to make petroleum deliveries to Vermont. The public

interest in preserving the environmental integrity of Lake Champlain, the sixth largest lake in the country and a jewel of nature, is sufficiently paramount that the parent corporation, Bushey, which profits from the operations of its alter-ego subsidiaries, should be accountable for any violation or continuing threat of violations to that integrity.

Equitable relief is not precluded by the Federal Water Pollution, Prevention and Control Act of 1972, 33 U.S.C. § 1251 *et seq.* (FWPCA). Section 1371(a)(1) of the FWPCA specifically provides that the Act "shall not be construed as . . . limiting the authority or functions of any officer or agency of the United States under any other law or regulation not inconsistent with this chapter." This provision was designed to "preserv[e] the authority of other Federal laws which are consistent with [the 1972 FWPCA]." S-H.R. Conference Rep. No. 92-1236, 92nd Cong., 2d Sess., 1972 U.S. Code Cong. & Ad. News 3825. *See also id.* at 3826 (noting the saving provision of the bill was found in both House and Senate versions and is adopted by Congress). Equitable relief has long been available under the Rivers and Harbors Act of 1899 or more specifically that section, 33 U.S.C. § 407, known as the Refuse Act, and there is no indication in the 1972 FWPCA that Congress intended to limit the equitable powers of courts under the Refuse Act. When Congress in enacting the 1972 FWPCA wanted to limit the scope of regulation under other acts dealing with pollution in navigable waters—specifically the Rivers and Harbors Act of 1910 and the Supervisory Harbors Act of 1888—it spoke clearly in doing so. *See* 33 U.S.C. § 1371(b).[1] It has

[1] The Federal Water Pollution and Control Act of 1972 does specify an alternate route for the Government to seek equitable relief, *see* 33 U.S.C. § 1321(e) and (*1*) in conjunction with Executive Order No. 11548 (July 20, 1970), *reprinted in* 33 U.S.C.A. note following § 1151. It specifically authorizes broad equitable relief when the Department of Interior requests the United States Attorney to act against the threat of oil pollution. The Department of Interior, however, did not request the United States Attorney to act here.

not done so in the case of the Act of March 3, 1899. Moreover, *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972), and *Texas* v. *Pankey*, 441 F.2d 236 (10th Cir. 1971), hold that there is a federal common law of nuisance and that the federal pollution control legislation is not the exclusive means by which federal policy concerning, and interest in, the quality of waters under federal jurisdiction may be protected. *See also Askew* v. *The American Waterways Operators, Inc.*, 41 U.S.L.W. 4507 (U.S., Apr. 18, 1973) (FWPCA held not to preempt state regulation).

The grounds for granting equitable relief here are two:

1. The Rivers and Harbors Act of 1899, 33 U.S.C. §§ 403, 407. *See generally Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191 (1967); *United States* v. *Republic Steel Corp.*, 362 U.S. 482, 491-92 (1960). *See also United States* v. *Pennsylvania Industrial Chemical Corp.*, 41 U.S.L.W. 4614 (U.S., May 14, 1973). Plainly oil is a pollutant under that act. *United States* v. *Standard Oil Co.*, 384 U.S. 224 (1966). *See also* 33 U.S.C. § 1161(b)(1). In dictum the Second Circuit has said that injunctive relief may be sought by the federal government for § 407 violations. *Connecticut Action Now, Inc.* v. *Royal Plating Co.*, 457 F.2d 81, 88-90 (2d Cir. 1972). *See also United States* v. *Armco Steel Corp.*, 333 F. Supp. 1073, 1076-78 (S.D. Tex. 1971); *United States* v. *Florida Power & Light Co.*, 311 F. Supp. 1391 (S.D. Fla. 1970); Note, *The Refuse Act: Its Role Within the Scheme of Federal Water Quality Legislation*, 46 N.Y.U. L. Rev. 304, 312-13 (1971).

2. The federal common law of nuisance. *Illinois* v. *City of Milwaukee, supra*, 406 U.S. at 103, 107-08; *Texas* v. *Pankey, supra*, 441 F.2d at 241-42. As the undersigned pointed out in an article, *Developments in Environmental Law*, 3 ELR 50001, 50009 (1973), the old law of public nuisance is being reshaped by the courts to fit the "realities

of morden technology." That is to say, under Restatement (Second) of Torts (Tent. Draft No. 17, 1971), there is no criminal requirement for public nuisance, that is, there need be no intent. *See generally* Bryson & Macbeth, *Public Nuisance, the Restatement (Second) of Torts, and Environmental Law,* 2 Ecology L.Q. 241 (1972). Rather, a public nuisance is "an unreasonable interference with a right common to the general public," in the words of Tentative Draft No. 17 § 821B(1). In this case one important factor conducing toward a determination that the defendants' interference with the right of the public in the waters of Lake Champlain to have those waters preserved from oil-spill pollution is "unreasonable," is the circumstance that such pollution is proscribed by the Refuse Act. § 821B(2)(b). In addition the pollution here has been of a recurring nature, although not continuous, producing long-lasting effects and substantial detriment upon the public right, with the actor—in this case, the defendants—knowing or having reason to know of that effect. § 821B(2)(c). *See* the discussion in the earlier phase of this case, 346 F. Supp. at 150. Here in fashioning the relief to be afforded to the public for the defendants' unreasonable interference with the public's rights in the waters of Lake Champlain the court has weighed the costs to the oil transportation industry, as will appear below. But that some relief is required, and permissible, there is no doubt.

The fact that there are now outstanding navigation rules regulating the navigation of defendants' vessels, Navigation Rules for Harbors, Rivers and Inland Waters Generally, 33 U.S.C. §§ 151 *et seq.,* and that pursuant to the delegation of special rule-making authority therein (33 U.S.C. § 157), the United States Coast Guard may promulgate Special Rules in respect to that regulation does not preclude the court from imposing additional

requirements or conditions of operation which do not conflict with regulations now in effect. Similarly the Coast Guard rules regarding pollution prevention issued in 37 Fed. Reg. 28250 *et seq.* (1972) by the authority of § 311(j) of the Federal Water Pollution Control Act, which will become effective on July 1, 1974, do not preclude judicial action now. *Cf. Illinois* v. *City of Milwaukee, supra.* In the interests of uniformity, the court has of course taken those rules into account. In certain instances by merely advancing the date for compliance with certain of them from July 1, 1974, to the start of the 1974 shipping season on Lake Champlain (which will probably be in April of 1974) the court does not see any conflict therewith.

In connection with the grant of relief and the Government's requests therefor, the court believes that the following must be ordered:

1. To require the maintenance of oil containment booms around tank vessels offloading petroleum products (other than gasoline or jet fuel) would not be overly expensive in and of itself, but it seems more practically to be the province of the terminal operator since he can better train and maintain a crew to put out the boom and can better supply the boat necessary to put it out. It is within the power of the Captain of the Port to order booms and in the court's view he should do so for the 1974 shipping season. *See* 37 Fed. Reg. at 28252. If this is not done the court will entertain a further application in this respect.

2. Pre-offloading conferences will be required on July 1, 1974, under § 156.120(q) of the new Coast Guard regulations, 46 Fed. Reg. at 28260, in any event so that there is no harm in requiring that they be held at the commencement of the shipping season. If the terminal operator refuses to comply the court will meet that contingency when it arises. The court believes, however, that Items

(9)-(12) inclusive, as set forth in Finding No. 51, may be better handled by written regulation and training than by a "conference."

3. Deck lighting on *self-propelled* vessels with five foot-candle intensity is required under the proposed Regulations, § 155.790, 37 Fed. Reg. at 28259, after July 1, 1974, and the court can see no earthly distinction in the necessity of deck lighting between a self-propelled and a non-self-propelled vessel, other than a limited item of expense, perhaps.

4. The court is modifying the Government's request to require inspection by a tank-vessel crewman of the integrity only of the tank vessel's equipment, the terminal operator being responsible for his own equipment. The "water surrounding the vessel" is not too vague and is subject to reasonable interpretation by court and tankerman alike.

5. A voice communications system will be required of both terminal operator and tank vessel on July 1, 1974, under the proposed Regulations, § 154.560, 37 Fed. Reg. at 28255, and § 156.120(m), 37 Fed. Reg. at 28260, respectively. If the terminal operators which Bushey serves do not see fit to use such equipment until July 1 the court will deal with that situation when it arises and in connection with any non-use will determine whether Bushey has used good faith efforts to get the terminal operators to install and utilize their end of the communications system required. Entire flexibility as to the kind of system is left up to the defendants.

6. The court agrees with the Government that drinking while on duty, though perhaps making the bargeman's lot

easier, is dangerous and that the company must take steps to prevent it. The defendants cannot, however, be expected to monitor their employees in off-duty hours, though they can and must institute inspection procedures to see that bargemen do not begin work while intoxicated.

7. The "damaging wake" request seems to the court better to lie within the Coast Guard's province both to regulate and to enforce.

8. A contingency plan to be submitted to EPA seems perfectly proper in view of defendants' past pollution proclivities.

9. To require all employees to be certified is unnecessary. The court will, however, order that at least one crew member of each tank vessel be certified.

10. The check list relating to Paragraphs 1, 2, 3 and 4 of the Order plus the EPA reports may make defendants and their employees more conscious of the necessity of pollution prevention and will, therefore, be ordered.

It is the intention of the court to submit the proposed Findings, Opinion and Order to the parties for further comment by the parties within 20 days. Absent modification of same they will take effect 30 days from the date hereof.

Order

Wherefore, this court permanently enjoins defendants Ira S. Bushey & Sons, Inc., and Spentonbush Transport Service, Inc., and each of them, their officers, agents, servants, employees and attorneys, and those persons or corporations in active concert or participation with them who receive notice of this order, to operate and supervise all

vessels and personnel employed by, belonging to, owned, operated, or used by them, or either of them, and by all persons and corporations owned, or controlled by, or under contract with them, or either of them, in the Vermont waters of Lake Champlain, so as to comply with the following requirements:

1. That commencing with the 1974 shipping season no tank vessel be off-loaded of any petroleum product except following a conference between the person in charge of the vessel and the person in charge of petroleum transfer operations at the receiving facility, at which conference the matters are discussed and agreed upon as referred to in Finding No. 51, which is hereby incorporated herein by reference.

2. That commencing with the 1974 shipping season no tank vessel be off-loaded of any petroleum product between sunset and sunrise unless the connection point between the vessel and the receiving facility is illuminated with an average minimum lighting intensity of five foot-candle power, subject to United States Coast Guard approval of same.

3. That commencing with the 1974 shipping season during the off-loading of any petroleum product from a tank vessel, a crewman holding a valid tankerman's certificate from the United States Coast Guard, endorsed for the grade of product being off-loaded, make periodic checks (A) on the integrity of all equipment of the tank vessel used during the off-loading; and (B) of the water surrounding the vessel for evidences of oil pollution.

4. That commencing with the 1974 shipping season no tank vessel be off-loaded of any petroleum product without maintaining a direct positive voice communication sys-

tem between the person in charge of the vessel and the person in charge of petroleum transfer operations at the receiving facility.

5. That no crew member of any vessel consume any alcoholic beverages while aboard or while on duty whether or not aboard; that no crew member bring any alcoholic beverages aboard any vessel or cause the same to be brought aboard; and that the defendants forthwith devise and implement a plan for ensuring compliance by its employees with this requirement, which plan shall include without limitation provisions for (i) frequent unannounced on-site inspection of vessels by shore-based personnel, (ii) referrals to the United States Coast Guard of suspected instances of crewmen being on duty in an unfit condition by reason of consumption of alcoholic beverages, (iii) bi-monthly reports during the shipping season to the Environmental Protection Agency of the specific steps taken during the reporting period to implement this order.

6. That the defendants prepare, subject to the approval of the Regional Administrator of the Environmental Protection Agency in Boston, a contingency plan outlining specific steps to be taken by its on-scene employees in the event of an oil spill from a vessel into Lake Champlain, so as to limit the adverse environmental consequences of such a spill.

7. That at least one employee of defendants or their wholly-owned subsidiaries performing any task aboard a tank vessel relating to the actual transportation or off-loading of petroleum products hold a valid tankerman's certificate issued by the United States Coast Guard and endorsed for the grade of product being transported or off-loaded.

8. That defendants require the person in charge of any tank vessel being off-loaded of any petroleum product to complete, as close in time to the actual off-loading as is practicable, a written check list certifying compliance with the applicable provisions of Paragraphs 1, 2, 3 and 4 of this order; that defendants inspect all such completed check lists periodically; and that bi-monthly during the shipping season defendants report in writing to the Environmental Protection Agency their compliance with these paragraphs, and if not in compliance the reason[s] which might justify such noncompliance.

Done at Brattleboro in the District of Vermont, this 21st day of August, 1973.

JAMES L. OAKES
U. S. Circuit Judge, sitting
by designation as
U. S. District Judge

Endorsed: Filed August 22, 1973
LEONARD W. LAFAYETTE
Deputy Clerk

APPENDIX B

Final Order of District Court.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Civil Action File No. 6380

UNITED STATES OF AMERICA,

v.

IRA S. BUSHEY & SONS, INC., TANKER HYGRADE NO. 8 INC., SPENTONBUSH TRANSPORT SERVICE, INC., NORTHERN OIL COMPANY, INC., and NORTHERN TERMINALS, INC.

SUPPLEMENTAL ORDER

The Findings, Opinion and Order dated August 21, 1973, having been submitted to the parties for comment prior to taking effect, plaintiff having made no comment and defendants Ira S. Bushey & Sons, Inc., Tanker Hygrade No. 8 Inc. and Spentonbush Transport Service, Inc., having proposed additional Findings and objecting to Sections 2 and 4 of the proposed Order as per the affidavit of Francis B. Bushey dated September 20, 1973, and the Court having considered same, the Court hereby ORDERS and DIRECTS that the Findings, Opinion and Order dated August 21, 1973, be and they hereby are made the judgment of the Court, effective forthwith and without modification.

Done at Brattleboro in the District of Vermont this 24th day of September, 1973.

JAMES L. OAKES
U. S. Circuit Judge
sitting by designation as
U. S. District Judge

Endorsed: Filed September 25, 1973
LEONARD W. LAFAYETTE
Deputy Clerk

APPENDIX C

Order Affirming Order of District Court.

UNTED STATES COURT OF APPEALS
At a stated term of the United States Court of Appeals,
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventh day of December, one thousand nine hundred and seventy-three.

Present: HON. IRVING R. KAUFMAN
Chief Judge
HON. STERRY R. WATERMAN
HON. WILFRED FEINBERG
Circuit Judges

73-2544
73-2564

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

IRA S. BUSHEY & SONS, INC., TANKER HYGRADE NO. 8 INC., SPENTONBUSH TRANSPORT SERVICE, INC., NORTHERN OIL COMPANY, INC., and NORTHERN TERMINALS, INC.,

Defendants,

IRA S. BUSHEY & SONS, INC., TANKER HYGRADE NO. 8, INC., and SPENTONBUSH TRANSPORT SERVICE, INC.,

Defendants-Appellants.

Appendix C—Order Affirming Order of District Court.

Appeal from the United States District Court for the District of Vermont.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Vermont, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the orders of said District Court be and they hereby are affirmed with costs to be taxed against the appellants.

A. DANIEL FUSARO
Clerk

by: VINCENT A. CARLIN
Chief Deputy Clerk

A true copy.

A. DANIEL FUSARO
Clerk

by VINCENT A. CARLIN
Chief Deputy Clerk

Filed: February 11, 9:33 AM '74
Clerk By RER
Deputy Clerk

APPENDIX D

Order Denying Petition for Rehearing.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixth day of February, one thousand nine hundred and seventy-four.

Present:

HON. IRVING R. KAUFMAN,
Chief Judge,
HON. STERRY R. WATERMAN
HON. WILFRED FEINBERG,
Circuit Judges.

Docket Nos. 73-2544
73-2564

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

IRA S. BUSHEY & SONS, INC., TANKER HYGRADE NO. 8 INC., SPENTONBUSH TRANSPORT SERVICE, INC., NORTHERN OIL COMPANY, INC., and NORTHERN TERMINALS, INC.,

Defendants,

IRA S. BUSHEY & SONS, INC., TANKER HYGRADE NO. 8, INC., and SPENTONBUSH TRANSPORT SERVICE, INC.,

Defendants-Appellants.

Appendix D—Order Denying Petition for Rehearing.

A petition for a rehearing having been filed herein by counsel for the appellants,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO
A. DANIEL FUSARO
Clerk

by VINCENT A. CARLIN
Chief Deputy Clerk

APPENDIX E

Order Denying Petition Suggesting Rehearing In Banc.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixth day of February, one thousand nine hundred and seventy-four.

Docket Nos. 73-2544
73-2564

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

IRA S. BUSHEY & SONS, INC., TANKER HYGRADE NO. 8 INC., SPENTONBUSH TRANSPORT SERVICE, INC., NORTHERN OIL COMPANY, INC., and NORTHERN TERMINALS, INC.,

Defendants,

IRA S. BUSHEY & SONS, INC., TANKER HYGRADE NO. 8, INC., and SPENTONBUSH TRANSPORT SERVICE, INC.,
Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellants, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

Judge Oakes took no part in consideration of the question whether to grant rehearing en banc.

WILFRED FEINBERG
Acting Chief Judge

APPENDIX F

Text of 33 U.S.C. 407.

§ 407. Deposit of refuse in navigable waters generally

It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: *Provided,* That nothing herein contained shall extend to, apply to, or prohibit the operations in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States officers supervising such improvement or public work: *And provided further,* That the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful.

APPENDIX G

Text of 33 U.S.C. 1161(j)(1)

33 § 1161

Issuance of rules and regulations consistent with the National Contingency Plan; compliance; imposition of civil penalties for violations; amount

(j) (1) Consistent with the National Contingency Plan required by subsection (c) (2) of this section, as soon as practicable after April 3, 1970, and from time to time thereafter, the President shall issue regulations consistent with maritime safety and with marine and navigation laws (A) establishing methods and procedures for removal of discharged oil, (B) establishing criteria for the development and implementation of local and regional oil removal contingency plans, (C) establishing procedures, methods, and requirements for equipment to prevent discharges of oil from vessels and from onshore facilities and offshore facilities, and (D) governing the inspection of vessels carrying cargoes of oil and the inspection of such cargoes in order to reduce the likelihood of discharges of oil from such vessels in violation of this section.

APPENDIX H

Text of 33 U.S.C. 1321(j)(1).

33 § 1321

Regulations; penalty

(j) (1) Consistent with the National Contingency Plan required by subsection (c) (2) of this section, as soon as practicable after October 18, 1972, and from time to time thereafter, the President shall issue regulations consistent with maritime safety and with marine and navigation laws (A) establishing methods and procedures for removal of discharged oil and hazardous substances, (B) establishing criteria for the development and implementation of local and regional oil and hazardous substance removal contingency plans, (C) establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil and hazardous substances from vessels and from onshore facilities and offshore facilities, and to contain such discharges, and (D) governing the inspection of vessels carrying cargoes of oil and hazardous substances and the inspection of such cargoes in order to reduce the likelihood of discharges of oil from vessels in violation of this section.

(2) Any owner or operator of a vessel or an onshore facility or an offshore facility and any other person subject to any regulation issued under paragraph (1) of this subsection who fails or refuses to comply with the provisions of any such regulations, shall be liable to a civil penalty of not more than $5,000 for each such violation. Each violation shall be a separate offense. The President may assess and compromise such penalty. No penalty shall be assessed until the owner, operator, or other person charged shall have been given notice and an opportunity for a hearing on such charge. In determining the amount of the penalty, or the amount agreed upon in compromise, the gravity of the violation, and the demonstrated good faith of the owner, operator, or other person charged in attempting to achieve rapid compliance, after notification of a violation, shall be considered by the President.

APPENDIX I

Text of 46 U.S.C. 391(a).

MODE, MANNER, AND EXTENT OF INSPECTION; CERTIFICATES; RECORDS

§ 391a. Vessels carrying certain cargoes in bulk

(1) Statement of Policy.—The Congress hereby finds and declares—

That the carriage by vessels of certain cargoes in bulk creates substantial hazards to life, property, the navigable waters of the United States (including the quality thereof) and the resources contained therein and of the adjoining land, including but not limited to fish, shellfish, and wildlife, marine and coastal ecosystems and recreational and scenic values, which waters and resources are hereafter in this section referred to as the "marine environment".

That existing standards for the design, construction, alteration, repair, maintenance and operation of such vessels must be improved for the adequate protection of the marine environment.

That it is necessary that there be established for all such vessels documented under the laws of the United States or entering the navigable waters of the United States comprehensive minimum standards of design, construction, alteration, repair, maintenance, and operation to prevent or mitigate the hazards to life, property, and the marine environment.

(2) Vessels Included.—All vessels, regardless of tonnage size, or manner of propulsion, and whether self-propelled or not, and whether carrying freight or passengers for hire or not, which are documented under the laws of the United States or enter the navigable waters of the United States, except public vessels other than those

engaged in commercial service, that shall have on board liquid cargo in bulk which is—

(A) inflammable or combustible, or

(B) oil, of any kind or in any form, including but not limited to, petroleum fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil, or

(C) designated as a hazardous polluting substance under section 1162(a) of Title 33;

shall be considered steam vessels for the purposes of title 52 of the Revised Statutes of the United States and shall be subject to the provisions thereof: *Provided,* That this section shall not apply to vessels having on board the substances set forth in (A), (B), or (C) above only for use as fuel or stores or to vessels carrying such cargo only in drums, barrels, or other packages: *And provided further,* That nothing contained herein shall be deemed to amend or modify the provisions of section 4 of Public Law 90-397 with respect to certain vessels of not more than five hundred gross tons: *And provided further,* That this section shall not apply to vessels of not more than five hundred gross tons documented in the service of oil exploitation which are not tank vessels and which would be subject to this section only because of the transfer of fuel from the vessels' own fuel supply tanks to offshore drilling or production facilities.

(3) Rules and Regulations.—In order to secure effective provision (A) for vessel safety, and (B) for protection of the marine environment, the Secretary of the department in which the Coast Guard is operating (hereafter referred to in this section as the "Secretary") shall establish for the vessels to which this section applies such additional rules and regulations as may be necessary with respect to the design and construction, alteration, repair, and main-

tenance of such vessels, including, but not limited to, the superstructures, hulls, places for stowing and carrying such cargo, fittings, equipment, appliances, propulsive machinery, auxiliary machinery, and boilers thereof; and with respect to all materials used in such construction, alteration, or repair; and with respect to the handling and stowage of such cargo, the manner of such handling or stowage, and the machinery and appliances used in such handling and stowage; and with respect to equipment and appliances for life saving, fire protection, and the prevention and mitigation of damage to the marine environment; and with respect to the operation of such vessels; and with respect to the requirements of the manning of such vessels and the duties and qualifications of the officers and crew thereof; and with respect to the inspection of all the foregoing. In establishing such rules and regulations the Secretary may, after hearing as provided in subsection (4), adopt rules of the American Bureau of Shipping or similar American classification society for classed vessels insofar as such rules pertain to the efficiency of hulls and the reliability of machinery of vessels to which this section applies. In establishing such rules and regulations, the Secretary shall give due consideration to the kinds and grades of such cargo permitted to be on board such vessel. In establishing such rules and regulations the Secretary shall, after consultation with the Secretary of Commerce and the Administrator of the Environmental Protection Agency, identify those established for protection of the marine environment and those established for vessel safety.

(4) Adoption of Rules and Regulations.—Before any rules or regulations, or any alteration, amendment, or repeal thereof, are approved by the Secretary under the provisions of this section, except in an emergency, the Secretary shall (A) consult with other appropriate Federal

departments and agencies, and particularly with the Administrator of the Environmental Protection Agency and the Secretary of Commerce, with regard to all rules and regulations for the protection of the marine environment, (B) publish proposed rules and regulations, and (C) permit interested persons an opportunity for hearing. In prescribing rules or regulations, the Secretary shall consider, among other things, (i) the need for such rules or regulations, (ii) the extent to which such rules or regulations will contribute to safety or protection of the marine environment, and (iii) the practicability of compliance therewith, including cost and technical feasibility.

(5) Rules and Regulations for Safety; Inspection; Permits; Foreign Vessels.—No vessel subject to the provisions of this section shall, after the effective date of the rules and regulations for vessel safety established hereunder, have on board such cargo, until a certificate of inspection has been issued to such vessel in accordance with the provisions of title 52 of the Revised Statutes of the United States and until a permit has been endorsed on such certificate of inspection by the Secretary, indicating that such vessel is in compliance with the provisions of this section and the rules and regulations for vessel safety established hereunder, and showing the kinds and grades of such cargo that such vessel may have on board or transport. Such permit shall not be endorsed by the Secretary on such certificate of inspection until such vessel has been inspected by the Secretary and found to be in compliance with the provisions of this section and the rules and regulations for vessel safety established hereunder. For the purpose of such inspection, approved plans and certificates of class of the American Bureau of Shipping or other recognized classification society for classed vessels may be accepted as evidence of the structural efficiency of the hull and reli-

ability of the machinery of such classed vessels except as far as existing law places definite responsibility on the Coast Guard. A certificate issued under the provisions of this section shall be valid for a period of time not to exceed the duration of the certificate of inspection on which such permit is endorsed, and shall be subject to revocation by the Secretary whenever he shall find that the vessel concerned does not comply with the conditions upon which such permit was issued: *Provided,* That rules and regulations for vessel safety established hereunder and the provisions of this subsection shall not apply to vessels of a foreign nation having on board a valid certificate of inspection recognized under law or treaty by the United States: *And provided further,* That no permit shall be issued under the provisions of this section authorizing the presence on board any vessel of any of the materials expressly prohibited from being thereon by subsection (3) of section 170 of this title.

(6) Rules and Regulations for Protection of the Marine Environment; Inspection; Certification.—No vessel subject to the provisions of this section shall, after the effective date of rules and regulations for protection of the marine environment, have on board such cargo, until a certificate of compliance, or an endorsement on the certificate of inspection for domestic vessels, has been issued by the Secretary indicating that such vessel is in compliance with such rules and regulations. Such certificate of compliance or endorsement shall not be issued by the Secretary until such vessel has been inspected by the Secretary and found to be in compliance with the rules and regulations for protection of the marine environment established hereunder. A certificate of compliance or an endorsement issued under this subsection shall be valid for a period specified therein by the Sec-

retary and shall be subject to revocation whenever the Secretary finds that the vessel concerned does not comply with the conditions upon which such certificate or endorsement was issued.

(7) Rules and Regulations for Protection of the Marine Environment Relating to Vessel Design and Construction, Alteration, and Repair; International Agreement.—(A) The Secretary shall begin publication as soon as practicable of proposed rules and regulations setting forth minimum standards of design, construction, alteration, and repair of the vessels to which this section applies for the purpose of protecting the marine environment. Such rules and regulations shall, to the extent possible, include but not be limited to standards to improve vessel maneuvering and stopping ability and otherwise reduce the possibility of collision, grounding, or other accident, to reduce cargo loss following collision, grounding, or other accident, and to reduce damage to the marine environment by normal vessel operations such as ballasting and deballasting, cargo handling, and other activities.

(B) The Secretary shall cause proposed rules and regulations published by him pursuant to subsection (7) (A) to be transmitted to appropriate international forums for consideration as international standards.

(C) Rules and regulations published pursuant to subsection (7) (A) shall be effective not earlier than January 1, 1974, unless the Secretary shall earlier establish rules and regulations consonant with international treaty, convention, or agreement, which generally address the regulation of similar topics for the protection of the marine environment. In the absence of the promulgation of such rules and regulations consonant with international treaty, convention, or agreement, the Secretary shall

establish an effective date not later than January 1, 1976, for rules and regulations previously published pursuant to this subsection (7) which he then deems appropriate.

(D) Any rule or regulation for protection of the marine environment promulgated pursuant to this subsection (7) shall be equally applicable to foreign vessels and United States-flag vessels operating in the foreign trade. If a treaty, convention, or agreement provides for reciprocity of recognition of certificates or other documents to be issued to vessels by countries party thereto, which evidence compliance with rules and regulations issued pursuant to such treaty, convention, or agreement, the Secretary, in his discretion, may accept such certificates or documents as evidence of compliance with such rules and regulations in lieu of the certificate of compliance otherwise required by subsection (6) of this section.

(8) Shipping Documents.—Vessels subject to the provisions of this section shall have on board such shipping documents as may be prescribed by the Secretary indicating the kinds, grades, and approximate quantities of such cargo on board such vessel, the shippers and consignees thereof, and the location of the shipping and destination points.

(9) Officers; Tankermen; Certification.—(A) In all cases where the certificate of inspection does not require at least two licensed officers, the Secretary shall enter in the permit issued to any vessel under the provisions of this section the number of the crew required to be certified as tankermen.

(B) The Secretary shall issue to applicants certificates as tankermen, stating the kinds of cargo the holder of such certificate is, in the judgment of the Secretary, quali-

fied to handle aboard vessels with safety, upon satisfactory proof and examination, in form and manner prescribed by the Secretary, that the applicant is in good physical condition, that such applicant is trained in and capable efficiently to perform the necessary operations aboard vessels having such cargo on board, and that the applicant fulfills the qualifications of tankerman as prescribed by the Secretary under the provisions of this section. Such certificates shall be subject to suspension or revocation on the same grounds and in the same manner and with like procedure as is provided in the case of suspension or revocation of licenses of officers under the provisions of section 239 of this title.

(10) Effective Date of Rules and Regulations.—Except as otherwise provided herein, the rules and regulations to be establshed pursuant to this section shall become effective ninety days after their promulgation unless the Secretary shall for good cause fix a different time. If the Secretary shall fix an effective date later than ninety days after such promulgation, his determination to fix such a later date shall be accompanied by an explanation of such determination which he shall publish and transmit to the Congress.

(11) Penalties.—(A) The owner, master, or person in charge of any vessel subject to the provisions of this section, or any or all of them, who shall violate the provisions of this section, or the rules and regulations established hereunder, shall be liable to a civil penalty of not more than $10,000.

(B) The owner, master, or person in charge of any vessel subject to the provisions of this section, or any or all of them, who shall knowingly and willfully violate the provisions of this section or the rules and regulations es-

tablished hereunder, shall be subject to a fine of not less than $5,000 or more than $50,000, or imprisonment for not more than five years, or both.

(C) Any vessel subject to the provisions of this section, which shall be in violation of this section or the rules and regulations established hereunder, shall be liable in rem and may be proceeded against in the United States district court for any district in which the vessel may be found.

(12) Injunctive Proceedings.—The United States district courts shall have jurisdiction for cause shown to restrain violations of this section or the rules and regulations promulgated hereunder.

(13) Denial of Entry.—The Secretary may, subject to recognized principles of international law, deny entry into the navigable waters of the United States to any vessel not in compliance with the provisions of this section or the regulations promulgated thereunder.

As amended July 11, 1968, Pub.L. 90-397, § 4, 82 Stat. 341; July 10, 1972, Pub.L. 92-340, Title II, § 201, 86 Stat. 427.

(55670)

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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Supreme Court, U.S.
FILED
JUN 17 1974
MICHAEL RODAK, JR., CLERK

No. 73-1353

UNITED STATES OF AMERICA,

Respondent,

v.

IRA S. BUSHEY & SONS, INC., TANKER HYGRADE NO. 8 INC., SPENTONBUSH TRANSPORT SERVICE, INC.,

Petitioners,

NORTHERN OIL COMPANY, INC., and NORTHERN TERMINALS, INC.,

Defendants.

MOTION AND BRIEF FOR *AMICUS CURIAE* AMERICAN WATERWAYS OPERATORS, INC. FILED IN SUPPORT OF PETITIONERS

CHARLES C. BINGHAM,
Attorney for American Waterways Operators, Inc.,
30 Broad Street,
New York, N.Y. 10004

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA,

Respondent,

v.

IRA S. BUSHEY & SONS, INC., TANKER HYGRADE NO. 8 INC., SPENTONBUSH TRANSPORT SERVICE, INC.,

Petitioners,

NORTHERN OIL COMPANY, INC., and NORTHERN TERMINALS, INC.,

Defendants.

MOTION AND BRIEF FOR *AMICUS CURIAE* AMERICAN WATERWAYS OPERATORS, INC. FILED IN SUPPORT OF PETITIONERS

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The American Waterways Operators, Inc. (hereinafter AWO), moves this Court, pursuant to rule 42(1a) of the Revised Rules (1972) for leave to file the accompanying brief as *amicus curiae*. The consent of the petitioners has been obtained.

The interests of the movant in this case and its reasons for requesting leave to file the accompanying brief *amicus curiae* appear below.

Movant is a non-profit trade association representing the national interests of operators of non self-propelled barges, towboats and tugboats providing transportation services of oil and other hazardous products as the latter are defined in 33 USC 1321. AWO members operate vessels on the United States navigable inland waters and over coastal and seagoing routes in all areas of the country. The association's executive office is in Washington, D. C. It has regional offices in New York, N. Y. and New Orleans, La. AWO has over 250 members, of which more than 180 operate barges and towing vessels performing transportation of oil, hazardous commodities and other products.

Barges pushed by towing vessels on inland waters and pulled or pushed by such vessels on offshore coastal routes in the Gulf of Mexico and along the east and west coasts of the United States move over 15 percent of the total United States domestic commerce. Over 20,947 barges are so engaged, as are 4,278 tugboats to propel such barges. In 1972 (the last year for which data is available) the total tonnage transported by barges amounted to 597,255,337 tons, approximately 60 percent of which was oil and other fuel.

The interest of AWO and each of its members are vitally affected by the decision below since the District Court in creating regulations relating to the discharge of oil products, has infringed on an area totally preempted by federal legislation, specifically the authority delegated by the Congress to issue vessel regulations.

Aside from these basic issues which petitioners present to the Court, the decision below has created a situation which to movant and to the entire shipping community is of major significance and serious concern. If allowed to stand the decision below would allow Courts throughout the country to impose different regulations as to oil vessel operation that may not only conflict with Coast Guard regulations, but may also conflict with each other.

The effect of such a rule on the water transportation of oil between states is clear. In the course of a year a barge of the type operated by members of AWO usually will call at ports in numerous states. If its base of operations is on the Mississippi River it may visit practically every state bordering thereon. If based on a North Atlantic port, it may call at every Atlantic coastal state. If the District Court in each district of those states has jurisdiction to issue its own rules and regulations applicable to one or more barge owners the confusion which will result is obvious.

We urge, therefore, that the decision of the lower court be vacated and the subject and regulation of oil carriage be left to the Coast Guard as clearly intended by Congress.

Movant, accordingly, requests leave to file the accompanying brief so that these issues which are of great importance to the oil carrying industry can be presented to the court.

CHARLES C. BINGHAM
Attorney for movant
American Waterways Operators Inc.
30 Broad Street
New York, N. Y. 10004

BRIEF OF AMERICAN WATERWAYS OPERATORS, INC., AS *AMICUS CURIAE*

The Interest of American Waterways Operators, Inc., *Amicus Curiae*

The American Waterways Operators, Inc. (AWO) is a non-profit trade association representing the national interests of operators of non self-propelled barges, towboats and tugboats providing transportation services including transportation of oil and hazardous products as the latter are defined in 33 USC 1321. AWO members operate vessels on the United States navigable inland waters and over coastal and seagoing routes in all areas of the country. The association's executive office is in Washington, D.C. It has regional offices in New York, N.Y. and New Orleans, La. AWO has over 250 members, of which more than 180 operate barges and towing vessels performing transportation services of oil, hazardous commodities and other products.

Barges pushed by towing vessels on inland waters and pulled or pushed by such vessels on offshore coastal routes in the Gulf of Mexico and along the east and west coasts of the United States move over 15 percent of the total United States domestic commerce. Over 20,947 barges are so engaged, as are 4,278 tugboats to propel such barges. In 1972 (the last year for which data is available) the total tonnage transported by barges amounted to 597,255,337 tons, approximately 60 percent of which was oil and other fuel.

The interest of the association in this case is:

The legal issue whether a United States District Court has jurisdiction to issue an injunction which in effect requires compliance with new regulations promulgated for

the first time by the Court governing the operation, within that Court's territorial jurisdiction, of vessels subject to inspection and regulation by the United States Coast Guard (Department of Transportation) and licensed to carry on the coastwise trade.

ARGUMENT

POINT I

The District Courts do not have jurisdiction to impose regulations upon the operation of vessels subject to inspection and regulation by the the United States Coast Guard and licensed to carry on the coastwise trade.

The District Court found that defendants' barges, which are the subject of the majority of regulations imposed upon defendants, had been issued Certificates of Inspection by the United States Coast Guard (Finding No. 11).[1] Such inspection was carried out pursuant to 46 USC 391a(2) and 46 USC 391a(5)[2] providing that vessels carrying inflammable or combustible liquid cargo or oil in bulk should be considered steam vessels and subject to the provision of the statutes relating thereto. (See also 46 USC 170, applicable to vessels transporting explosives or like dangerous cargo.)

46 USC 391a is specific and complete in its delegation to the Coast Guard of the obligation to establish, for the involved type of craft, such additional rules and regulations as may be necessary with respect to the design, construction, alteration, repair, maintenance, manning and duties and qualifications of officers and crew of such vessels. Support for this position can be found in 46 USC 391a(3) which calls for the Secretary of the department

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[1] Cf. p. 3A of petition for writ.

[2] Set forth at pp. 38a and 41a of petition for writ.

in which the Coast Guard is operating to establish such rules and regulations with regard to the vessels in question.

That the legislature intended that the Coast Guard and not the District Courts be charged with the duty of amending and supplementing these rules can be found in section 203 of Public Law 92-340[1] which requires annual reports to Congress from the Secretary of the department in which the Coast Guard is operating for the ten years following the effective date of 46 USC 391a (July 10, 1972).

> "Such report shall include but not be limited to
>
> (A) A description of the rules and regulations prescribed by the Secretary
>
> • • • • • •
>
> (iii) to reduce damage to the marine environment from the normal operation of the vessels to which this title applies."

(1972 US Code Cong. & Admin. News at 516.)

In deciding what Congress intended by the words "normal operation of the vessels" it is unnecessary to look any farther than section 391a(1) where Congress specifically declared that the carriage of certain types of cargo "creates substantial hazards to life, property, the navigable waters of the United States (including the quality thereof) and the resources contained therein." This language clearly acknowledges that the carriage of oil is a dangerous matter, which Congress saw fit to leave to the expertise of the Coast Guard, not the District Courts.

Further support for the position that Congress intended that the Coast Guard and no other body be charged with this rule-making power is that pursuant to section 203, P.L. 92-340, the annual report called for requires a "description of the rules and regulations prescribed by the Secretary" (1972 US Code Cong. & Admin. News at 516).

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[1] See Appendix B page 1a *infra*.

The fact that such a description is requested every year is a clear indication that the Secretary would be changing these regulations. Nowhere is there a request for rules promulgated by the various District Courts.

In an introduction to its regulations[1] the Coast Guard clearly sets forth the Congressional intent of Section 203 P.L. 92-340 (1972 U.S. Code Cong. & Admin. News at 516), and the broad national policy to reduce oil pollution, where it stated:

> "Recognizing this Nation's social and industrial dependence upon oil, these regulations are intended to provide maximum protection to the environment while remaining within economic and practical bounds." 37 FR 28250

Additionally, 33 USC 1321j(1)[2] provides for the promulgation by the President of regulations "establishing procedures, methods, and equipment to prevent discharges of oil and hazardous substances from vessels . . . and to contain such discharges and for inspection of vessels carrying cargoes of oil and hazardous substances." The President delegated to the Secretary of Transportation responsibility for issuance of those regulations (Executive Order July 20, 1970, 35 FR 11677).

Under date of December 14, 1972 the Coast Guard (Department of Transportation) issued complete and far-reaching regulations for the transfer of cargoes from all types of vessels, propelled and non self-propelled (barges) (37 Fed. Reg. No. 246 Pt. II, 12/21/72). In comparison, the majority of the regulations imposed by the Court relate also to transfer of oil from barges to shore terminals, thus duplicating but enlarging upon the Coast Guard's regulations.

---

[1] See Appendix C page 29 *infra*.

[2] See petitioners' Appendix H page 37a.

As a result of the above it is clear that Congress has provided for the complete and substantial regulation of the transportation of oil by barge and its transfer to shore facilities. These regulations, promulgated and subject to amendment by the Coast Guard under congressional authority, pre-empt action by any other agency to promulgate duplicative or conflicting regulations whether the agency be a State or United States District Court.

A second important factor to consider is the expertise possessed by the Coast Guard in the specialized field of promulgating regulations for vessel design, manning, equipment, operation and general safety, and the District Court's lack of that expertise. In the record of the case we can refer to two such examples, which do not reflect on the judicial ability of the trial Court. At one point in a discussion concerning Coast Guard regulations the Court stated it was "pretty much of a novice in this regard." Appendix, *infra* p. 1a.

Again, referring in its opinion to the Coast Guard regulations the Court stated it could "see no earthly distinction in the necessity of deck lighting between a self-propelled and a non self-propelled vessel other than a limited item of expense, perhaps." Appendix A to petitioners' brief p. 24A. Yet the Coast Guard could and did comprehend such distinction, which it made plain in its regulations, sections 155.790 37 FR 28259 and 154.570(3), 37 FR 28255 providing that a self-propelled vessel must supply the lighting but in the case of a barge the terminal must do so. It is a matter of knowing from experience the design and capabilities of the different types of vessels.

In this case the Court required of defendants that at least one employee aboard a tank vessel hold a valid tankerman's certificate.[1] If the District Court of Vermont is declared to have such authority to make such requirement, any other District Court could require that there be at least two or three men aboard holding valid tankerman's certificates.

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[1] Petitioners' Appendix p. 27a—Item 7.

We submit that, under the principle of division of powers a United States Court cannot and should not attempt to regulate vessels licensed to carry on the coastwise trade, under the guise of public nuisance or any other form of injunctive relief.

A third and final factor to be considered is the far reaching effect the decision of the lower court will have on each and every member of AWO. The possibility of the numerous district courts imposing different, and in some cases conflicting regulations on AWO member effects not only AWO members, but users of the product carried by AWO members throughout the country.

In the course of a year a barge of the type operated by members of AWO usually will call at ports in numerous states. If its base of operations is on the Mississippi River it may visit practically every state bordering thereon. If based on a North Atlantic port, it may call at every Atlantic coastal state. If the District Court in each district of those states has jurisdiction to issue its own rules and regulations applicable to one or more barge owners the confusion which will result is obvious.

There is ample precedent in this Court's history for striking down regulations applicable to a limited jurisdiction (e.g. a state) where the regulation will effectively burden commerce between the several states.

In *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761 (1945), this Court held unconstitutional an Arizona statute which placed a limitation on the length of all trains traveling within the state of Arizona. In discussing the far-reaching effect of the statute and the burden it would place on commerce this Court at page 775 stated:

> "If one state may regulate train lengths, so may all the others, and they need not prescribe the same maximum limitation. The practical effect of such regulation is to control train operations beyond the

boundaries of the state exacting it because of the necessity of breaking up and reassembling long trains at the nearest terminal points before entering and after leaving the regulating state. *The serious impediment to the free flow of commerce by the local regulation of train lengths and the practical necessity that such regulation, if any, must be prescribed by a single body having a nation-wide authority are apparent.*" (Italics supplied)

The language quoted above is particularly applicable to the instant case, in that the Coast Guard, by Congressional delegation, has been designated the single administrative body responsible for promulgating rules concerning oil carrying vessels. The attempt by the District Court to substitute its own judgment for that of Coast Guard not only circumvents Congressional intent, but creates a burden to commerce which this Court has already deemed unconstitutional.

A case very similar to *Southern Pacific, supra* and decided some fourteen years later is *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959). In that case, the State of Illinois passed a statute requiring a particular type of rear fender mudguard on all trucks and trailers traveling the highways of that state. Again, this Court held that provision unconstitutional on the ground that it interfered with the free flow of commerce between the states. Significant in the Court's determination was the fact that "the statute, taken together with a Rule of Arkansas Commerce Commission requiring [different type] of flaps rendered the use of the same motor vehicle equipment in both states impossible.

The fact that the instant case speaks to regulations imposed by a District Court rather than a state statute does not in any way affect the ultimate evil sought to be eliminated—a burden on commerce between the states.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES C. BINGHAM,
Attorney for American Waterways Operators, Inc.,
30 Broad Street,
New York, N.Y. 10004

APPENDIX A

Excerpt From Page 82 of Joint Appendix Filed in the United States Court of Appeals for the Second Circuit.

Mr. Heckman: I submit, Your Honor, the regulations speak for themselves.

The Court: Yes, they do, but since the Court is pretty much a novice in this regard, I will be interested in having the Captain's guidance to the regulations. It may save us all some time.

APPENDIX B

Text of Sec. 203 of P.L. 92-340.

Sec. 203. The Secretary of the Department in which the Coast Guard is operating shall, for a period of ten years following the enactment of this title, make a report to the Congress at the beginning of each regular session, regarding his activities under this title. Such report shall include but not be limited to (A) a description of the rules and regulations prescribed by the Secretary (i) to improve vessel maneuvering and stopping ability and otherwise reduce the risks of collisions, groundings, and other accidents, (ii) to reduce cargo loss in the event of collisions, groundings, and other accidents, and (iii) to reduce damage to the marine environment from the normal operation of the vessels to which this title applies, (B) the progress made with respect to the adoption of international standards for the design, construction, alteration, and repair of vessels to which this title applies for protection of the marine environment, and (C) to the extent that the Secretary finds standards with respect to the design, construction, alteration, and repair of vessels for the purposes set forth in (A) (i), (ii), or (iii) above not possible, an explanation of the reasons therefor.

APPENDIX C

Text of Introduction to Coast Guard Regulations Fed. Reg. Vol. 37, No. 246, Part II, Page 1.

TITLE 33—NAVIGATION AND NAVIGABLE WATERS

Chapter I—Coast Guard, Department of Transportation

Subchapter O—Pollution

[CCD 71—160R]

POLLUTION PREVENTION VESSEL AND OIL TRANSFER FACILITIES

1. *Description and purpose of action.* The U.S. Coast Guard, acting under the authority of section 311(j) of the Federal Water Pollution Control Act, as amended (FWPCA), intends to issue regulations governing the design, construction, and operation of vessels operating in the navigable waters and contiguous zone of the United States, and governing the design, construction, and operation of onshore and offshore facilities engaged in the transfer of oil in bulk (more than 250 barrels) to and from vessels.

The purpose of these regulations is to reduce the probability of an accidental discharge of oil or oily wastes during normal vessel operations, during the bulk transfer of oil or oily wastes to or from vessels, or as a result of certain vessel accidents of limited energy. Although the high-energy collision or grounding is spectacular and may create locally severe environmental degradation, more significant and continuous degradation generally results from the regular and frequent discharges of oil into the waters of the United States. Furthermore, it is believed that the most effective means of minimizing the ecological damage of high-energy accidents is to prevent their occurence through operational controls external to the vessel. The recently enacted Bridge-to-Bridge Communica-

tions Act and Ports and Waterways Safety Act should provide this control.

The final regulations are set forth below and constitute a part of this statement.

2. *Probable environmental impact.* The expected impact of these regulations is a reduction in the amount of oil discharged into the navigable waters of the United States.

The magnitude of the incidents at which these regulations are aimed is not known with certainty at this time. It is clear that not all discharges of harmful quantities of oil are reported and that quantities of reported discharges are often underestimated. For this reason thorough assessment of the impact of these regulations on oil pollution can only follow an initial period of actual regulation. In general, vessel casualties involving a discharge of oil are relatively infrequent and result in medium or major incidents. Discharges during transfer operations are generally more frequent and involve minor or medium incidents, though the potential for a major incident is present whenever large quantities of bulk cargo are handled. It is anticipated that in combination with vessel traffic systems and vessel construction requirements to be developed under authority of the Ports and Waterways Safety Act of 1972, the preventive regulations will significantly request the incidence of discharges of oil into U.S. waters.

3. *Adverse environmental effects.* There are no expected adverse environmental effects.

4. *Alternatives.* The Coast Guard has available two distinct alternative courses of regulatory action:

a. Take no action and continue to enforce civil penalties without the benefit of preventive regulation. This course is the "status quo" alternative. Penalty enforcement, however, involves the disadvantage of post-factum action—viz., the damage has already been done. Vigorous penalty

action can have only a limited impact upon faulty equipment or procedures which persist in use because of ignorance, indifference, or competitive pressure. The goal of the intended action is to promote oil-free water resources by removing the costs of environmental protection from the competitive arena and making them a fixed cost of operation applicable to all businesses.

b. Issue regulations more stringent than those described in this statement. To do so is to increase the additional cost of compliance out of proportion to the additional enhancement of the marine environment. The public costs of complying with the regulations the Coast Guard intends to promulgate are not precisely known. The regulations, however, based upon comments received at the public hearing, are considered to be a reasonable attempt to deal with known problems at a not unreasonable public cost. In the extreme, oil pollution might be virtually eliminated by issuing regulations so onerous as to make oil transfer or vessel operations economically unfeasible.

Stronger regulations could establish a requirement for persons engaged in oil transfer operations to obtain a permit issued by the Coast Guard. A formal permit system would produce a current inventory of all oil-handling facilities and allow inspection and control of such facilities to determine the adequacy of the physical plant, personnel, and procedures. A permit program of this kind was included in the Notice of Proposed Rule Making for the preventive regulations but has been withdrawn by the Coast Guard for the present time. A discussion of the permit system is contained in the preamble to the final regulations.

Besides these alternatives available to the Coast Guard, there are at least two broad alternative national policies which would significantly reduce oil pollution in U.S. waters. One alternative is to reduce the national demand for oil and thereby to reduce the amount of oil transported by tank vessel and transferred at marine facilities. This reduction might be brought about by one of two means.

Demand for oil could be arbitrarily reduced by placing a substantial tax upon the production, transport, or consumption of oil or by establishing a system of rationing or other controls. On the other hand, demand for oil could be more naturally reduced (i.e., without disrupting market forces) by developing alternative sources of energy, such as natural or synthetic gas, nuclear power, solar energy, or geothermal steam. A second national alternative is to promote a substitute for transshipment of oil by waterborne vessel. Other modes of transportation might include pipelines, rail or truck tank cars, or even transmission of electricity generated at oil sources.

The Coast Guard regulations described in this statement represent an attempt to achieve oil-free waters through a reasonable balance of punitive deterrence and modification of design, construction, and operation intended to minimize the opportunity for and the effects of human error or negligence. Recognizing this Nation's social and industrial dependence upon oil, these regulations are intended to provide maximum protection to the environment while remaining within economic and practical bounds. The regulatory process, however, is dynamic and evolutionary. As our experience and information improve, the preventive regulations will be modified as necessary.

5. *Relationship between local short-term use of man's environment and the maintenance and enhancement of long-term productivity.* Studies showing that oil can be harmful to marine organisms lead biologists to believe that chronic or excessive introduction of petroleum and its products into marine ecosystems may seriously disrupt those systems. Therefore, reducing the quantity of oil being discharged into U.S. waters is beneficial to both the short-term uses and the long-term productivity of the marine environment.

6. *Commitments of environmental resources.* This action does not result in any irreversible or irretrievable commitment of environmental resources.

7. *Government, public, and industry problems or objections.* The Coast Guard's proposed regulations were widely disseminated to interested parties and were the subject of a public hearing held on February 15, 1972, in Washington, D.C. Following the public hearing, written comments were accepted through April 21, 1972. All comments, written and oral, were reviewed, and the regulations were subsequently revised as noted in the preamble.

Comments on the draft environmental impact statement for this proposed action were received from only three sources. In light of these comments, the discussion of alternatives was expanded to consider both less extreme and non-Coast Guard alternatives. The anticipated reduction in pollution and the expected public cost of compliance have been discussed qualitatively in paragraphs 2 and 4(b), since no quantitative data are available. Copies of comments received on the draft statement are attached.

This amendment promulgates new regulations that govern certain aspects of the design, equipment, and operation of facilities and vessels engaged in the transfer of oil. The purpose of the regulations is to prevent the discharge of oil into the navigable waters and contiguous zone of the United States. A minor change to Part 151 of the same Subchapter O, concerning submission of oil record books from vessels in coastwise service, is also included.

A notice of proposed rule making (CGFR 71-160) with respect to these regulations was published in the December 24, 1971, issue of the FEDERAL REGISTER (36 F.R. 24960). Subsequent thereto the Ports and Waterways Safety Act of 1972 (Public Law 92-340) was enacted and which requires regulations be promulgated by the Coast Guard governing ship design and operation to prevent pollution from marine operations. It is emphasized that the regulations promulgated herein are not those required by the Ports and Waterways Safety Act but are issued under the Federal Water Pollution Control Act.

A public hearing on the proposed regulations was held on February 15, 1972, and the record remained open for written comment until April 21, 1972. Some 185 written comments were received from the public in addition to 31 State and territorial government responses and written comments from Coast Guard field offices. As a result of the written and oral comments the proposed regulations have been revised in part.

Many changes have been made to improve clarity without significant change in substance. Those changes that significantly alter the proposed regulations and those items that received considerable comment but which were not revised are discussed in the following paragraphs.

A comment generally applicable throughout the regulations was that the petroleum industry generally uses "barrels" rather than "gallons" as its unit of liquid measure. This change has been made and all volumes have been cited in barrels and rounded off. For example, 10,000 gallons has been changed to 250 barrels (10,500 U.S. gallons).

Another general comment concerned the effective dates assigned to the various parts and the consequences of having different effective dates for vessels and facilities. As a result of this latter difficulty, and to allow adequate time for both vessels and facilities to make the necessary physical and administrative changes required, most of these rules become effective on July 1, 1974. However, although enforcement will not occur before July 1, 1974, it should be noted that §§ 154.500, 154.510, and 155,800 place special requirements on hoses and loading arms manufactured or placed in service after June 30, 1973. Also, to allow the Coast Guard a reasonable period of time to handle the many administrative problems and to assure compliance by July 1, 1974, all existing transfer facilities are required by § 154.110 to file before July 1, 1973, a letter of intent to operate. Section 154.110 becomes effective 30 days after publication of these amendments.

The applicability of Part 154 was questioned and, in particular, objection was made to defining a large facility by the oil capacity of the vessels it serviced. The proposed applicability of Part 154 to oil transfer operations between facilities and vessels with a tank capacity of 10,000 gallons (now 250 barrels) is retained. The Coast Guard believes that this definition is the only way to reflect the operation's potential to pollute. Facilities that service vessels of this minimum capacity, regardless of the amount of oil actually transferred, will do so with equipment and pumping capacities of very large size. As to those objecting to any limitation on the facilities governed, the Coast Guard finds that presently the larger facilities are the significant problem and further, that smaller operations encompass different problems requiring different solutions. If spill data indicates that small facilities are a problem warranting regulation then further rule making action will be undertaken.

Several definitions were added to § 154.105 for clarification of the text and, in particular, the definition of oil was modified to exclude LNG and LPG (liquefied natural and petroleum gases), since, as a result of their properties, they cause an insignificant oil pollution problem.

The regulation which received the most comment was that of Part 154 requiring facility permits to conduct oil transfer operations. Public interest groups strongly supported this proposal and further recommended that vessel to vessel transfers should also be subject to a permit system. Opposition to the permit system was based not upon the concept, but upon the onerous administrative burden that such a system would place upon the industry, States, and the Coast Guard. The status of the existing discharge permit system administered by the Corps of Engineers and the Environmental Protection Agency was cited as a specific example. Opposition further cited legislative history as a basis for argument that a permit system is illegal because Congress had specifically considered and rejected

such an approach to oil pollution prevention. The problem of State certification under section 401(a) of the Federal Water Pollution Control Act (FWPCA) was directly addressed by the Coast Guard to each of the State and Territorial Governments. Only 31 replies were received of which only 10 indicated the State had a certification program in existence.

The purpose of the Coast Guard program must be kept clearly in mind when considering permits for oil transfer operations. The program is intended to minimize the risk of a spill during operations which do not include any intentional discharge into the water at a facility which has, by appropriate local, State and Federal agencies, been authorized to be built and operated. It is now the view of the Coast Guard that this purpose can best be achieved by a direct regulatory approach. The permit program will be held in abeyance while experience is gained in controlling oil transfer operations. Based upon this experience, the need for a permit program will be reassessed. Therefore the proposed regulations have been extensively revised to delete the requirements concerning permits and in lieu thereof require each facility to file a letter of intent to operate, control the equipment and conduct of operations, and require operations manuals for each facility. The Coast Guard will inspect each facility, will issue a report of inspection to each facility, will invoke civil penalties for operations conducted in violation of the regulations, and will take action to suspend operations when conditions are found that constitute an unacceptable risk to the environment.

Section 154.110, Letter of Intent, specifies that all facilities that conduct oil transfer operations must submit a letter, 60 days in advance of intended operations, that specifies the name of the operator and the facility and its location. For mobile facilities, such as tank trucks, the Captain of the Port must be advised of specific transfer locations at least 4 hours before each transfer. Initial

filing of letters for existing facilities must be done by July 1, 1973.

Section 154.120, Facility inspection, is a revision of proposed § 154.370. The revision requires the facility operator to maintain a record of all inspections conducted by the Coast Guard and to conduct any tests which the Coast Guard deems necessary to determine the facility's compliance with these regulations. The entries in the record of inspection will be made by the Coast Guard inspecting personnel and will reflect the scope of the inspection conducted and the conditions found to exist at the time of inspection. The requirement that the facility conduct all required tests is in keeping with the intent of the proposed regulations and with current policy that testing is a responsibility of the equipment owner or operator.

A new § 154.140, Suspension of oil transfer operations, provides for the Captain of the Port to suspend oil transfer operations whenever, in his opinion, the conditions found at the facility are in such variance with the regulations that further operations would constitute an undue threat to the environment.

A revision to proposed § 154.360, Operations manual: Contents (now designated § 154.310) is to require a description of the "person in charge" training and qualification program to be included in the operations manual.

A new § 154.760, Operations manual: Changes, has been added to Subpart D, Facility Operations, to clarify the intent of the proposals that the facility operator must maintain the manual current to reflect the operations as conducted, and must submit copies of the changes to the Captain of the Port.

Section 154.500 has been modified to permit nonferrous flange materials. The omission of nonferrous flanges was an oversight to the draft proposals and the Coast Guard is not aware of any condition which prevents their usage.

Numerous comments requested that a pressure shutdown switch be accepted in § 154.500 to limit hose and

system pressures. The Coast Guard does not believe that a pressure switch and the necessary associated control circuitry is an acceptable method upon which to rely for pressure control and no change is made in this regard.

A new paragraph (b) has been added to § 154.530, Small discharge containment, to define the "hose handling and loading arm areas" as those areas traversed by the free end of the hose or loading arm to which any oil in the hose may be discharged.

Several comments proposed that § 154.545 should require vessels to be enclosed by booms during transfer operations. The Coast Guard is of the opinion that these regulations are sufficiently broad that a Captain of the Port may, if specific conditions warrant, require a boom in place about the vessel (see §§ 154.140, 154.300(b) and 154.310(m)). However, booms, regardless of size or type, are ineffective in a current of more than 1½ knots and therefore a mandatory requirement for booms in place is not considered appropriate.

Comments suggested that § 154.550, Emergency shutdown, should permit a communications system to suffice under certain conditions. The comments submitted are particularly valid for offshore type facilities where a pier or other such structure is not used. Therefore, the proposed section has been modified to permit dedicated communications systems to a continuously manned control station and to amplify acceptable types of systems and their location.

Second only to the proposed permit requirement in number of comments received was the requirement for lighting contained in §§ 154.570 and 155.790. The objections were basically: The illumination specified was excessive for the need; the high cost of providing the specified degree of lighting; the degree of lighting specified created a navigation hazard to transient vessels by blinding the navigating officers; and many communities have ordinances which would class such illumination as a

public nuisance. Because of the general objection to the degree of illumination specified, the Coast Guard conducted illumination surveys at existing facilities that were considered to be adequately illuminated. As a result of these surveys the required illumination level has been reduced to 5 and 1 foot-candles from 10 and 2 as proposed. Additionally, the regulation has been modified to permit the Captain of the Port to accept lighting from portable sources at small or remote facilities and to permit the vessel to provide facility illumination. Fixed lighting is preferred but in some remote areas power is not available and a fixed installation is impracticable.

Proposed §§ 154.710 and 720, which concern designation and qualification of persons in charge, have been combined into a new § 154.710. Additionally, proposed § 154.710(a)(2) has been modified to permit the required 48 hours of experience to be at any facility engaged in oil transfer operations with the provision that the designee must also be familiar with and qualified to operate the facility for which designation is given. This change was made to facilitate the use of personnel at various locations. The Coast Guard retains the prerogative to review the designation of a person in charge to assure he has adequate experience.

Section 154.740 is changed to require the facility operator to maintain a record of facility inspection as previously discussed.

Proposed § 154.365 has been revised and relocated as §§ 154.760 and 154.770, Operations manual: Changes, and availability, respectively. The revision was made for clarity and the relocation was made because the regulation is more a condition for operation than a general requirement.

On June 15, 1972, the United States published a notice for the purpose of implementation and enforcement of laws and treaties in the contiguous zone as permitted by Article 24 of the Convention on the Territorial Sea and

Contiguous Zone. Therefore the applicability of Part 155 has been expanded to govern vessels in the navigable waters and contiguous zone in accordance with section 311 of the Federal Water Pollution Control Act. The Contiguous Zone is that area of water extending seaward 9 miles from the 3-mile territorial sea and thus, in general, extends applicability of the vessel oil pollution prevention regulations to 12 miles off shore.

Part 155.105 has several new definitions added for clarity in application of the part.

A great deal of criticism concerned the definition of "vessel" excluding public vessels, Navy or Coast Guard vessels, and thereby exempting them from the provisions of this part. The definition used is that contained in the Federal Water Pollution Control Act, as amended. However, attention is invited to Executive Order 11507 signed February 4, 1970, which requires all Federal vessels and facilities to have programs completed or underway by December 31, 1972, which will bring such facilities and vessels into compliance with air and water quality standards. The Army, Navy, and the Coast Guard have comprehensive programs underway and their vessels will, in fact, meet generally more restrictive requirements. Coast Guard vessels will for example, when in the navigable waters and contiguous zone, retain all vessel-generated wastes (sewage, laundry drains, galley waste, bilge wastes, and slop oil) on board.

A new § 155.130, similar to proposed § 154.140, has been added to provide that the Captain of the Port or the Officer in Charge, Marine Inspection, may suspend oil transfer operations if he deems that a severe risk to the environment would otherwise exist.

The inland barge industry entered strong objection to the proposed requirements for double wall construction of inland tank barges. The basis of the objection is that the costs have neither been adequately investigated nor has a case been made that double wall construction would significantly reduce oil pollution. The Coast Guard has, in co-

operation with the Maritime Administration, entered into a study of costs and alternatives, including complete double hull construction, which will be completed within 18 months. Therefore, implementation of proposed § 155.305 is being withheld pending the results of the study.

Proposed § 155.320 *Fuel oil discharge containment* has been extensively revised because of many problems which existing vessels would have in complying with the proposed regulation. Specifically, present fuel tank fill and vent lines on river towboats are so arranged as to make centralization economically impossible. As modified, the regulation requires all new construction to have an installed deck spill containment system to retain all small spills and overflows that occur during vessel fueling operations. For existing vessels, the use of small portable spill containment systems is allowed. Additionally, it was pointed out that many small river towboats are fueled with gas station type fuel hoses and have not been a pollution source. Therefore, for existing vessels, the proposed regulations have been modified to allow the use of flush deck fuel fittings when serviced by an automatic back pressure shut-off nozzle.

Sections 155.340 and 155.350, bilge slops, have been revised to clarify that these requirements apply only to vessels with machinery space bilges. Specifically, the requirements of these sections do not apply to the double bottoms of barges which would need pumping only in the event of a leak or casualty.

The applicability of §§ 155.340 and 155.350 has been clarified by substituting "Ocean or Coastwise service" for the proposed "international voyages." One purpose of this section is to provide and establish an internationally accepted standard fitting on all vessels using facilities that service both domestic and international vessels. The proposed fitting is one recognized by the Intergovernmental Maritime Consultative Organization (IMCO).

Section 155.350 has been modified to establish a 4-inch flange as the inland standard for oily waste discharge con-

nections instead of the proposed large international standard fitting. This was done at the request of the inland industry which considers the international fitting unnecessarily large for small inland vessels.

Proposed §§ 155.400, 155.410, 155.420, and 155.430 concerning the sealing of vessel overboard discharge valves have been deleted. Most comments indicated that such system was an unnecessary redundancy in view of the other sections of the regulations; that sealing would not be effective and would not provide a significant deterrent to intentional discharges of oil or oily waste; and that it would not be enforceable. Note that proposed §§ 155.450 and 155.460 have been renumbered §§ 155.400 and 155.410 respectively. With the deletion of the valve sealing requirements the proposed § 155.440: Placard, has been made applicable to all domestic vessels over 26 feet in length to alert shipboard personnel of the consequences of an intentional or careless discharge of oil.

Section 151.470 *Prohibited oil spaces* has been modified to apply only to self-propelled vessels. Self-propelled vessels have been the major source of spills from oil in forward spaces. It was pointed out that coastwise barges presently carry oil in their very large forward compartments and the proposed regulation would reduce their capacity by approximately 20 percent until the vessels could be modified. Since many of the technical details of defining the prohibited spaces on a barge are dependent upon much of the same data to be developed by the inland barge study, adoption of this proposed section is being stayed.

Many comments interpreted § 155.470 (b) as prohibiting vessels from carrying oil in wing tanks adjacent to the hull plate. Paragraph (b) applies only to spaces forward of the collision bulkhead specified in § 155.470(a).

Comments from the inland barge industry stated that their methods of operation were such that the requirement of § 155.700 *Designation of person in charge* could not be

accomplished. The Coast Guard feels it is essential that the owner, or an agent acting on behalf of the owner, recognize a responsibility for the conduct of operations on the vessel. Therefore, § 155.700 has been modified only to the extent of recognizing that an agent may act on behalf of the owner in designating persons in charge.

The major concern voiced about Part 156, Oil transfer operations, was that the Coast Guard did not assign an overall responsibility and therefore, liability for oil transfer operations. That is, the vessel and the facility presently share responsibility, each being responsible for his own area and jointly responsible for common areas (such as mooring lines, adequate freedom in hoses, etc.), and neither has overall responsibility for the entire operation. The Coast Guard feels it cannot go beyond the designation of responsibility which has been done in the proposed regulations. However, some wording changes have been included to recognize that a person in charge need not completely inspect both units and that he may accept the signature of the other unit's person in charge on the declaration of inspection as satisfactory evidence of the acceptable condition of the other unit.

In consideration of the foregoing, Subchapter O, Title 33, Code of Federal Regulations is amended to read as follows:

(55892)

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1353

IRA S. BUSHEY & SONS, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CKRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. A, 1a-28a) is reported at 363 F. Supp. 110. The court of appeals affirmed without an opinion (Pet. App. C, 30a-31a).

JURISDICTION

The judgment of the court of appeals was entered on December 7, 1973 (Pet. App. C, 30a-31a). Petitions for rehearing and for rehearing *en banc* were denied on February 6, 1974 (Pet. App. D, 32a-34a). The petition for a writ of certiorari was filed on March 6, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether federal administrative regulation of oil carrying vessels precluded specific equitable relief designed to prevent oil spills on Lake Champlain.

STATUTES INVOLVED

The relevant statutes are set forth at Pet. App. F, 35a-46a.

STATEMENT

Petitioners[1] are in the oil transport business and own approximately 25 vessels which are capable of operating in the Vermont waters of Lake Champlain. On September 13, 1971, after petitioners' vessels had been involved in a number of oil spills in those waters, the United States instituted this action seeking equitable relief for violations of Section 13 of the Rivers and Harbors Act of 1899, 30 Stat. 1152, 33 U.S.C. 407 ("The Refuse Act").[2]

In a non-jury trial, the district court found that between April 30, 1967 and November 6, 1972, petitioners' vessels were involved in nine incidents, several attributable to their negligence, which resulted in the spillage of over 33,000 gallons of petroleum products into the waters of Lake Champlain (Pet. App. A, 5a-12a). The various spills caused, among other things, the closing of Shelburne Harbor for a day because of fire hazard, the sealing of spill areas from Lake traffic, the death of wildlife, the fouling of a beach, and presented a substantial risk of damage to the water supply of the City of Burlington, which relies wholly on Lake Champlain water (Pet. App. A, 5a-15a). Based upon these findings, the district court

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[1]Ira S. Bushey & Sons, Inc., wholly owns Spentonbush Transport Service, Inc., and Tanker Hygrade No. 8, Inc.

[2]Two of the defendants, Northern Oil Company, Inc. and Northern Terminals, Inc., entered into a consent judgment on April 23, 1973.

held that petitioners had violated 33 U.S.C. 407 and the federal common law of nuisance. The court rejected petitioner's contention that Congress had pre-empted the field of regulation of oil-carrying vessels so as to preclude equitable relief and ordered a series of injunctive measures designed to prevent or lessen the danger of oil spills from petitioners' vessels (Pet. App. A.25a-28a). The court of appeals affirmed without opinion (Pet. App. C, 30a-31a).

ARGUMENT

Petitioners contend that the lower court erred in granting equitable relief pursuant to the Refuse Act and the federal common law of nuisance because other federal statutes and regulations, primarily the Federal Water Pollution Control Act of 1948 as amended,[3] regulations issued by the Coast Guard under authority of that Act, and the Ports and Waterways Safety Act of 1972, 86 Stat. 424, 427, 46 U.S.C. (Supp. II) 391a, *et seq.* preempt other relief. This contention is incorrect.

1. The Refuse Act fully supports the equitable relief granted by the district court. The Act proscribes the discharge or deposit from any ship, barge or floating craft of any refuse matter of any kind. It has been established that the Act applies to the spillage of oil, *United States* v. *Standard Oil Co.* 384 U.S. 224, and

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[3]62 Stat. 1155, 46 U.S.C. 466, *et. seq.*, as amended, Act of July 17, 1952, 66 Stat. 755; Water Pollution Control Act Amendments of 1956, 70 Stat. 498; Federal Water Pollution Control Act Amendments of 1961, 75 Stat. 204; Water Quality Act of 1965, 79 Stat. 903; Clean Water Restoration Act of 1966, 80 Stat. 1246; Water Quality Improvement Act of 1970, 84 Stat. 91, 33 U.S.C 1151, *et seq.*; Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, 33 U.S.C (Supp. II) 1251, *et seq.*

that injunctive relief is appropriate. *United States* v. *Republic Steel Corp.*, 362 U.S. 482; *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191; *Connecticut Action Now, Inc.* v. *Roberts Plating Co.*, 457 F. 2d 81, 88 (C.A. 2).

The Refuse Act has not been repealed by the Federal Water Pollution Control Act or the Ports and Waterways Safety Act. To the contrary, remedies under the Refuse Act are specifically preserved by the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. (Supp. II) 1371(a); 33 U.S.C. (Supp. II) 1321(o)(3). *United States* v. *Pennsylvania Chemical Corporation*, 411 U.S. 655, 668. And there is no evidence in the Ports and Waterways Safety Act of 1972, 46 U.S.C. (Supp. II) 391a, *et seq.* or the legislative history of the Act, that repeal of other applicable acts was intended by Congress. Cf. *Asken* v. *American Waterways Operators, Inc.*, 411 U.S. 325. Moreover, although the Ports and Waterways Act does grant broad powers to the Coast Guard to issue regulations for protection of the marine environment, the power is permissive and not mandatory. 46 U.S.C. 391a(4). To date, no regulations dealing with preservation of the marine environment have been issued pursuant to that Act.

In *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 104, this Court held that "[t]he application of federal common law to abate a public nuisance in interstate or navigable waters is not inconsistent with the Water Pollution Control Act." The Court further stated, 406 U.S. at 107:

> [N]ew federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that time comes to pass, federal

> courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution. * * *

It is clear, therefore, that the mere fact that the Coast Guard possesses unexercised power under the Ports and Waterways Act to issue regulations does not preclude judicial action now to ameliorate petitioner's interference with the public's right to the enjoyment of unpolluted water in Lake Champlain.

2. Although the Coast Guard has not issued regulations pursuant to the Ports and Waterways Act, it has issued regulations for protection of the marine environment pursuant to the Federal Water Pollution Control Act. That Act, however, as mentioned above, specifically preserves the additional remedies at issue here. Moreover, there is no conflict between the lower court's order and the Coast Guard regulations. In some instances the court merely advanced the effective date of the regulations from July 1, 1974 to the start of the 1974 shipping season on Lake Champlain. The court did this, for example, with those Coast Guard regulations requiring a pre-transfer conference (33 C.F.R. 156.120(q); Pet. App. A, 26a); a voice communication system between the vessel commander and the terminal operator (33 C.F.R. 154.560; Pet. App. A, 26a-27a), and a certified tankerman in charge of oil transfer operations (33 C.F.R. 155.710(a)(1); Pet. App. A, 26a). In other instances the court acted interstitially to supplement the Coast Guard provisions. For example, the Coast Guard requirement that self-propelled vessels be equipped with deck lights of five foot-candle power for nighttime operations (33 C.F.R. 155.790) was extended by the court to non-self-propelled vessels (Pet. App. A, 26a). The Coast Guard mandate that a contingency plan

be formulated for reporting and containing oil discharges (33 C.F.R. 154.310(p)) was adopted by the court, but in light of the specific history of oil spills here, with the added proviso that the plan be subject to the approval of the Regional Administrator of the Environmental Protection Agency in Boston (Pet. App. A, 27a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

CARLA A. HILLS,
Assistant Attorney General.

STEPHEN F. EILPERIN,
RICHARD A. OLDERMAN,
Attorneys.

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